85-1147

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

RADIATION TECHNOLOGY, INC.

Petitioners,

v.

NEUTRON PRODUCTS, INC.

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

JOSEPH H. SHARLITT
1750 Pennsylvania Avenue, N.W.
Suite 322
Washington, D.C. 20006
Telephone: (202) 393-4940

Counsel for Petitioner
Radiation Technology, Inc.

QUESTIONS PRESENTED

(1) Is it permissible for a trial court to enter findings of fact (in a proceeding under Rule 11, Federal Rules of Civil Procedure) based on a proceeding in the same case but before another judge, 17 months earlier?

(2) Is it permissible for a trial court to go beyond the proper function of the Court in a Rule 56 proceeding and enter findings and issue an award of attorneys' fees under Rule 11, F.R.C.P., based on a wholly different proceeding (in the same case), which occurred 17 months earlier before another jodge?

(3) Is a party against which sanctions under Rule 11 are sought deprived of due process when an award of those sanctions

is made without notice to that charged party that the motion seeking sanctions was to be heard, and without an opportunity for the charged party or its affiants to be heard?

(4) Is a party against which sanctions under Rule 11 are sought deprived due process of law when the trial court enters an award of sanctions (based on the party's submitting allegedly false affidavits concerning facts disputed by the parties in a proceeding 17 months earlier before another judge), without giving the charged party the opportunity to subpoena and cross-examine its opponents' affiants to demonstrate the falseness of their affidavits on these disputed facts?

(5) Another question, spearate from those posed above but rising in the same

case (and its proceeding under Rule 11), is whether a trial court is lawfully authorized to enter findings of fact on facts disputed by the parties in a Rule 56 proceeding on summary judgment.

PARTIES TO THE PROCEEDING

A list of the parties to this proceeding is contained in the caption.

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OPINIONS BELOW

The Findings of Fact, Conclusions of Law concerning Defendant Neutron Products' Motion for Summary Judgment and to Recover Costs, Expenses and Attorney's fees (entered by Judge William P. Gray on October 4, 1985) are set forth in Appendix (reproduced at App.A-1). The per curiam judgment and opinion of the U.S. Court of Appeals for the Fourth Circuit (which is unpublished) dated August 26, 1985, is set forth in the Appendix (reproduced at App.C-11). The Order of that Court dated October 2 denying rehearing is set forth in the Appendix (reproduced at App.D-1).

JURISDICTION

Petitioner invokes the jurisdiction

of this Court under Section 2101 (c) of Title 28, U.S.C.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and the statutes at issue are as follows:

U.S. Const. Amend. V:

No person shall...be deprived of life, liberty, or property, without due process of law...

Rule 11, Federal Rules of Civil Procedure;

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished.

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good grounds to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Rule 56, Federal Rules of Civil Procedure:

(c) Motion and Proceeding Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The Judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is no genuine issue as to the amount of damages.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the

court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits causes him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

The dispute before this court arose on May 30, 1984 when a visiting Judge (Judge William Gray of the Central Division of California, sitting by designation as a trial court in the U.S. District Court for the district of Maryland in a case assigned to the docket of Judge John Hargrove of that Court) heard and adjudicated Respondent's motion for summary judgment. Judge Gray had no connection with the case until that day. He indicated to the parties that he was returning to Los Angeles on the following day.1/ He would have no further involvement with the case.

1/ R. 56; Citations to the Joint Appendix before the Fourth Circuit are preceded with an "R"; Citations to the appendix before this Court are preceded with "App."

Following extensive argument on Respondent's motion for summary judgment and an adjournment at Judge Gray's request during the day to permit him to examine the voluminous files in the case 2/, Judge Gray granted summary judgment to Respondent on Petitioner's Complaint.

Judge Gray then proceeded beyond the Rule 56 motion scheduled for that day (May 30, 1984) and addressed a motion that was not scheduled for that day, Respondent's Motion based on Rule 11, Federal Rules of Civil Procedure, seeking costs and attorneys' fees against the Petitioner.

2/ Judge Gray stated before the adjournment: "Gentlemen I wish I had time to study this entire record." (R. 44)

That motion had not been scheduled for hearing on May 30th, nor on any date. 3/ Plaintiff's counsel had no notice that it was to be heard that day. Moreover, Respondent's Rule 11 motion was addressed solely to Petitioner's sworn statements in, and the prosecution of, petitioner's motion for preliminary injunction disposed of 17 months earlier by another Judge, Judge Norman Ramsey.

3/ Respondent filed its motion under Rule 11 on April 25, 1984. On May 9, Counsel for Respondent wrote Judge Hargrove (to whom the case had been transferred from Judge Ramsey) that Respondent wished to have its Motion for fees heard on May 30, along with Respondent's Motion for Summary Judgment (App. K-1). On May 16 counsel for Petitioner wrote the Court that it believed Respondent's motion for fees to be groundless but that Respondent's allegations in it:

> "require separate, careful response, as the Court will recognize."

That letter from Petitioner concluded:

> "Plaintiff requests that the hearing on May 30 be restricted to the issue originally set by the Court for argument on that date: to wit, the motion for summary judgment."(App. L-1).

The last word form Judge Hargrove was a letter to both counsel on April 18 stating that the hearing on May 30 was to be devoted to Respondent's motion for summary judgment without mention of the Rule 11 motion.(App. J-1).

Notwithstanding the fact that no notice of the Rule 11 motion had been given to Petitioner's counsel and notwithstanding the fact that the Rule 11 motion dealt with a proceeding and a determination made by Judge Ramsey 17 months earlier, Judge Gray, in a ten minute colloquy at the close of a day's argument on summary judgment, stated he perceived disputes of fact in sworn statements filed by the parties 18 to 20 months earlier--in the preliminary injunction proceeding before Judge Ramsey. 4/ On May 30, 1984, seventeen

4/R. 80-89

months later, Judge Gray made no investigation of his own concerning those disputes of fact. On May 30, 1984 Judge Gray did not have before him in the courtroom Petitioner's affiants in the earlier proceeding, nor Respondent's affiants subpoenaed for cross-examination as to the facts averred by them 18 months earlier. These witnesses were not in the Courtroom in Baltimore because Petitioner had been given no notice that the Rule 11 motion was to be heard on that day.

Notwithstanding, Judge Gray proceeded to make findings of fact (under Rule 11) on averments of disputed facts filed by the parties in the proceeding on preliminary injunction before Judge Ramsey 17 months

earlier. 5/ Judge Ramsey had made no such findings; nor was he required to because the Motion for preliminary injunction had been withdrawn with Judge Ramsey's consent 17 months before May 30, 1984. 6/

With no witnesses before him, with no testimony taken, Judge Gray entered a series of Rule 11 findings on the facts disputed in the motion for preliminary injunction 17 months earlier as to: (1) Whether the sources of Cobalt-60 (containers of that radioactive material, the commodity

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5/ App. A-11 through A-17.

6/ See letter of Petitioner's counsel dated January 18, 1983 to Judge Ramsey; (App. H-1); Over opposition by Respondent, the withdrawal of Petitioner's motion for preliminary injunction was approved by Judge Ramsey.

involved in this case) were safe and (2) whether the State of Arkansas (where they were to be delivered) had refused entry to these sources until and unless they were reencapsulated (new and adequate containers placed on the Cobalt-60) within one year. 7/

Judge Gray's series of findings of fact, on a paper record reflecting outright factual disputes between the sworn testimony of the parties on the foregoing issues, was entered without hearing one word from testimony from either side's affiants, and moved Judge Gray--within those same 10 minutes--to enter an award of $26,500 in attorneys' fees against Petitioner. 8/ Although

7/ App. A-11 through A-17
8/ App. B-1

there were no less than 22 findings entered by Judge Gray on this same issue, his ultimate finding was aimed explicitly at the preliminary injunction proceeding before Judge Ramsey 17 months earlier:

> "53: The claims in the verified complaint and the Welt affidavit which formed the basis of the motion for preliminary injunction concerning the safety of the sources, the alleged governmental requirements that they be reencapsulated, and the aleged need for equitable relief to make the sources safe and to for Neutron" (Respondent herein) "to reencapsulate them, were made without any factual support, and either in actual bad faith or with such a reckless disregard of the truth as to constitute bad faith" (Finding 53, Findings of Fact and Conclusion of Judge William Gray, filed in the U.S. District Court in Baltimore on October 10, 1984 App. A-21 .

This finding, as strong a finding as can be made in civil litigation, was entered by Judge Gray under Rule 11 without hearing one word of testimony from Peititoner's President, Dr. Martin Welt, who disputed, in sworn statements, each and every one of the facts found by Judge Gray.

This finding was entered by Judge Gray on May 30, 1984 without affording Petitioner the opportunity to cross-examine Respondent's affiants (in the preliminary injunction proceeding 17 months earlier) as to the veracity of what they swore to in that proceeding. These opportunities were foreclosed because neither party was notified that the Rule 11 motion was to be heard on that day (May 30, 1984).

Judge Gray accepted Respondent's affiants averments in their entirety, rejected those of Petitioner's President in their entirety, and entered findings of facts based on the averments of Respondent's affiants. 9/ This was the basis on which Judge Gray made the Rule 11 award of $26,500 in attorneys' fees against Petitioner.

Judge Gray entered an award of $26,500 in attorneys' fees to Respondent on a series of findings of fact which remain wholly in dispute on the record in this case; Judge Gray entered an award of $26,500 based on his perception of the disputed facts before Judge Ramsey in a proceeding before by Judge Ramsey 17 months before May 30, 1984--when Judge Gray acted.

9/ App. A-1 through A-28

Judge Gray also entered summary judgment in favor of Respondent against Petitioner on Petitioner's complaint with the same material facts remaining at issue before the parties. (App A-20)

Judge Gray's findings were made at the conclusion of a hearing under Rule 56. Respondent's motion for Rule 11 sanctions was not before Judge Gray; neither Petiitoner nor Respondent was notified that the Rule 11 motion was to be heard on May 30th.

Petitioner's position in this Petition to this Court is that it was denied due process in the extraordinary and peremptory Rule 11 proceeding that occurred within a 10 minute colloquy before Judge Gray on May 30, 1984. Basic fairness and case law under Rule 11

(cited, infra Section G(ii)) support the Petitioner.

Judge Gray's findings and conclusions were docketed in the U.S. District Court in Baltimore on October 19, 1984. By order dated November 23, 1984, Judge Hargrove granted petitioner's motion under Rule 54 (b) certifying that Judge Grays' order (docketed October 19, 1984) was a final, appealable order 11/ and entered a stay of Judge Gray's award of counsel fees pending apeal.

Petitioner filed its Notice of Appeal to t he U.S. Court of Appeals for the Fourth Circuit on November 13, 1984. Briefs were filed before that Court and argument heard on June 4, 1985. By judgment rendered on August 26, 1985, the Court of Appeals affirmed Judge

11/ R. 3-4

Gray's Order in a per curiam opinion. 12/ 13/ The awared was paid by Plaintiff to Defendant on October 28, 1985. The rectitude of that award (and whether Respondent should be required to disgorge) is before the Court in the present petition. Also before the Court is whether Judge Gray's Rule 11 findings so tainted his adjudication of the Summary Judgment motion as to invalidate his ruling on that Motion as well.

ARGUMENT FOR GRANTING THE WRIT.

(A) Petitioner's Motion for Preliminary Injunction (the basis of its Rule 11 motion) was disposed of by Judge Ramsey on January 18,1983) 17 months before Respondent raised it again in its Rule 11 motion before another judge.

12/ App. C-1

13/ A petition for rehearing and stay was denied by the Fourth Circuit (App. D-1). A Petition for Stay was denied by this Court (on October 10, 1985, numbered R, 274)

Petitioner filed suit against Respondent on August 13, 1981. Its Complaint was verified by its President, Dr. Martin Welt. 15/ By motion filed August 18th, Petitioner sought a preliminary injunction. 16/ Initially that motion sought interim relief on other issues as well as Reencapsulation. Respondent sought and secured five separate delays in filing its Amended answer, without which the case was not at issue. On December 23, 1982 Respondent filed its Amended Answer and Counterclaim. 17/ On the same day, December 23, 1982,

15/ R. 106-117; R. 405-421
16/ R. 91-104.
17/ R. 0-A

counsel for Petitioner notified counsel for Respondent that Petitioner's motion for preliminary injunction was to be heard before Judge Norman Ramsey (to whom the case had been assigned) on January 21, 1983. That same letter to counsel for Respondent informed counsel for Respondent that the Motion would be:

> "limited to the reencapsulation of pencils in Arkansas"18/

No objection to this limitation on the motion for preliminary injunction was ever voiced by Respondent.

On January 18, 1983, counsel for

18/ App. F-1

Petitioner wrote to Judge Ramsey to state that Petitioner was withdrawing its motion for preliminary injunction because Arkansas had indicated that it would review the requirement that it had imposed (eight months before) requiring reencapsulation of Repsondent's sources 19/ within one year of entry into Arkansas (where Petitioner took delivery of the Cobalt-60) by mid-April, 1983. Accordingly, on January 18, Petitioner's Counsel informed the Court that there might be no need whatever for the Court's intervention if Arkansas' review changed Arkansas reencapsulation requirement. Arkansas' six (6) month period of review made it unnecessary for the Court to

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19/ App. H-1

address the reencapsulation issue at that time--or ever--if Arkansas did in fact change its position. If Arkansas' review did not change its requirement, Petitioner stated that it would revew its motion 20/

Respondent opposed Petitioner's withdrawal of its motion, as reported by counsel for Petitioner to Judge Ramsey in his January 18th letter. 21/ It is Counsel for Petitioner's belief that this opposition was also voiced by Respondent directly to Judge Ramsey's law clerk. The withdrawal of the motion for preliminary injunction (set for hearing on January 21, 1983) on grounds of possible mootness was permitted by Judge Ramsey. There was no hint by the Court of impropriety in what petitioner requested.

20/ Ibid.
21/ Ibid.

Nor did Respondent seek sanctions of any kind at that time.

The disposition of the motion for preliminary injunction by Judge Ramsey did not resurface for 17 months, 22/ until May 4, 1983, when Respondent filed its motion for sanctions based solely on Petitioner's affidavits in support of, and its prosecution of Petitioner's motion for preliminary injunction. In those intervening 17 months the case had been transferred from Judge Ramsey to Judge John Hargrove. But Judge Hargrove did not rule on Respondent's Rule 11 motion; Judge William Gray (of the Central Division of California) entertained that motion for sanctions against Petitioner based on Petitioner's motion for preliminary

22/ R. 252-254; App. I-1

injunction 17 months earlier before Judge Ramsey.

(B) Petitioner's Motion for Preliminary Injunction and averments in support of it and those opposing it raised disputed issues of fact.

(i)

PETITIONER'S SWORN POSITION.

Petitioner's Complaint (verified by its President, Dr. Martin Welt 23/) averred (in paragraph 7 thereof) that Arkansas had imposed the requirement that the entire shipment of Cobalt-60 into Arkansas (made in April 1982) be reencapsulated within one year of shipment. Further, Dr. Welt's affidavit of January 10, 1983 (in support of Petitioner's motion for preliminary injunction) swore that the requirement was imposed by the Arkansas Health Officials as a

23/ R. 106-117

condition of the license permitting entry of Respondent's sources into Arkansas. 24/ The affidavit also averred that immediately prior to the shipment of the Cobalt-60 into Arkansas in April of 1982, Dr. Welt had secured from Respondent's President, Jackson Ransohoff, an undertaking to reencapsulate the sources of Cobalt-60 within that year at no cost to the Petitioner. 25/

This undertaking was pursuant to warranty WD-4-78 in the contract between the parties. 26/

24/ R. 523-524; App. E-1
25/ Ibid
26/ R. 409-418 at 418

Dr. Welt had, on October 22, 1982 uttered an affidavit which averred again, that Arkansas had refused entry of the Coblat-60 unless it was reencapsulated by April of 1983. In that affidavit, Dr. Welt stated: 27/

> "The true facts are that following examination of the defective sources by a consultant hired by our company, Steven Fishman, Ph.D., it was clear that the defective sources raised a problem under the warranty given by Defendant NP." (the Respondent herein) "Defendant NP then consulted officials of the Nuclear Regulatory Commission, and it was the recommendation of one such official, made in the Defendant NP's office, that the requirement be imposed on Defendant NP to reencapsulate the

27/ R. 500-508; App. E-1; it is this affidavit (in Section IV herein) that is so hotly disputed by the parties, and by their respective affiants.

> defective sources within one year. That NRC recommendation was then accepted by the State of Arkansas."

At six points in his deposition 28/ (taken by Respondent) Dr. Welt again repeated graphically that there (in one such reference):

> "Wasn't a snowball's chance in hell"29/

of getting Arkansas to let these sources 30/ in without a promise to reencapsulate.

Dr. Welt's position is corroborated

28/ See : the deposition transcript pages are at R 823, 824, 826, 826A, 899;

29/ R. 899

30/ "Source" is the term applied to radioactive Cobalt-60 that has been processed, encapsulated, and is ready for safe commercial use in the sterilization of pharmaceutics and foodstuffs, and in testing.

by correspondence initiated by Respondent just prior to the shipment of the Cobalt-60 to Arkansas in April of 1982. On March 29, 1982 (one week before shipment by Respondent to Akransas commenced), Turkanis (an official of Respondent in charge of Respondent's operations) wrote Dr. Welt:

> "Since your need for these sources is immediate, and delivery of 304L is still in the 12 to 14 week range. and since there is no technical basis for not using these sources, we recommend that you request the State of Arkansas to approve, for your use in your West Memphis facility, the sources which we fabricated for you. This is necessary beause the sources we submitted to the AEC for the Source Device Catalogue specified that there would be no cracks in the metallographic production control samples."
>
> "We sill submit an amendment to our Source and Device catalogue procedure to permit this type of microcrack in stablized austenitic stainless such as Types 321 and 347, pending successful evaluation. Upon completion of this effort, you will be able to transfer these sources to other irradiators." (Turkanis to welt, March 29, 1982, App.)"31/

31/ R. 537-539

In two separate letters within that same week to Bernard Bevill, in charge of Arkansas' health authority's licensing office, Turkanis made the same request:

> "We would appreciate your immediate initiating of review of our request to award previous submissions to accept the microcracks...as an acceptable deviation to our specifications in the Source and Device Catalogue' 31A/ (Turkanis to Bevill, April 1, 1982)32/ (emphasis supplied).

The Source and Device Catalogue is a federal document listing permissible specifications in the handling and shipment of radioactive materials. One day later Turkanis again wrote Bevill:

> "...While those microcracks represent a literal deviation from our written specifications...there is no reason to believe that their presence will have any material impact on the safety or usefulness of these sources." (Turkanis to Bevill, April 2, 1982)33/ (emphasis supplied).

31A/ R. 540
32/ Ibid.
33/ R. 541-542

The foregoing is Petitioner's sworn position in this record.

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RESPONDENT'S SWORN POSITION.

In its Rule 11 motion (based solely on the reencapsulation issue) 34/ 34A/ Respondent submitted five affidavits disputing Dr. Welt's sworn averments that Arkansas refused entry into Arkansas of Respondent's Cobalt-60

34/ R. 252-254; App. I-1 to 3.

34A/ Filed 17 months after Judge Ramsey had disposed of Petitioner's Motion for Preliminary Injunction, the subject of the Rule 11 Motion.

until Petitioner commited to re-encapsulate it within a year; and further disputing that Respondent had undertaken to reencapsulate at no cost to Petitioner. These affidavits were from Ransohoff,35/ Bevill, (of Arkansas' health office), Fasiczka, (of O'Donnell & Associates, consulted by Respondent on the issue of the microcracks), Fishman, (a relative of Dr. Welt, consulted by Dr. Welt on this issue) and Taboada, (of NRC) who made a recommendation concerning the microcracked sources.

Ransohoff's affidavit, in paragraph 21 thereof is noteworthy. It states at the outset.

> "21. We do not take issue with Dr Welt's position that an offer to reencapsualte, if requested, was necessary in order to receive prompt approval to take the sources into Arkansas. Furthermore, it is true that we had offered to provide sources with an outer encapsulation.

35/ R.--635.

> of 304L; or 316L if, after due deliberation, such action was required by the regulatory authorities.
>
> Nor do we take any issue with any representations Dr. Welt may have made to Arkansas that the sources would be reencapsulated within a year in the event that upon due deliberations, Arkansas decided not to license the sources for normal use and life." 36/

The balance of that paragraph set forth Ransohoff's sworn statment that Arkansas was willing to admit the Cobalt-60 as it was, and then Arkansas would conduct its evaluation. As noted above, Dr. Welt flatly refutes this.

37/ Ransohoff further asserts that Dr. Welt had no authority from the Respondent to offer reencapsulation at the time of the original entry of the Cobalt-60 into Arkansas. 38/ Dr. Welt flatly disputes that statement. 38A/

36/ Ibid.
37/ App. E-1; App. G-1
38/ R.635
38A/ App. E-1; App. G-1

Bevill's affidavit of January 14, 1983 devotes considerable detail as to what his Department did, and did not do in March and April of 1982 when Respondent sought to get Arkansas' approval for entry of its sources into the State. Paragraph 7 of his affidavit states that Arkansas' only evaluation of Respondent's sources took place after Process Technology's (Petitioner's wholly-owned subsidiary in West Memphis, Arkansas)

> "commitment to having the sources reencapsulated within one year. 39/

The closest that Bevill comes to stating what Arkansas' position was prior to receiving that commitment is found in paragraph 8 of

39/ R.- 592.

his affidavit:

> "No evaluation was conducted by our Deparmtent of the safety of the subject sealed sources for use for any time period beyond one year since no license request was received from the licensee and since the license voluntarily commited to have the sources reencapsulated within one year. (Bevill affidavit of January 14, 1984, emphasis supplied.) 40/

If that commitment was voluntarily made by Petitioner on April 2, 1982, it (1) flatly contradicts Dr. Welt's sworn testimony and (2) it is totally inconsistent with the Turkanis letters to Arkansas (cited above) immediately prior to shipment requesting Arkansas to admit the sources as they were. What Arkansas said and did in order to get that "voluntary commitment" from the Petitioner is never related by Bevill. It is set forth with stark certainty by Dr. Welt. 41/ Dr. Welt swore that Arkansas refused to admit the sources without the commitment 42/: a fact neither admitted nor denied nor addressed by Bevill. The inference that Bevill attempts to create is that Petitioner voluntarily, gratuitously offered reencapsulatic The image created by Bevill and Ransohoff is that of Dr. We

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40/ At R. 592
41/ App. E-1; G-1
42/ Ibid.

symbolically shooting himself in the foot. Respondent's own letters to Arkansas dispel this nonsense. 43/ Dr. Welt flatly denies it.

Taboada's (the NRC representative called in by Respondent to analyze the microcracks) affidavit of January 14, 1983, states (in paragraph 7 thereof) that he made no recommendation to Arkansas to limit its license for one year; 44/ that averment is flatly disputed by Dr. Welt's affidavit of October 22, 1982 (cited in the previous subsection), which not only states that Taboada made a recommendation, but relates where Taboada made it. 45/ Either Taboada or Dr. Welt is not telling the truth. Unlike the gray areas of dispute betwen Dr. Welt's sworn averments and those of Bevill and Ransohoff, the conflict here is clear.

43/ R. 403, R. 408
44/ R. 669
45/ App. E-1

Finally, Fishman's affidavit was filed by Respondent in support of its Rule 11 motion. There are two facts (neither of compelling relevance) in that affidavit that Dr. Welt freely admitted departed from the literal truth. The first is that Fishman was "hired" by Petitioner. Fishman is a relative of Dr. Welt, and if the word "hired" connotes payment, Fishman was never 'hired" because he was never paid. Consulted he was, however. And Fishman fully admits that he read the O'Donnell reprots on the microcracks. 46/ Fishman, however, did not examine the sources. He read the O'Donnell report. In no other respect does the Fishman affidavit conflict with Dr. Welt's affidavit of October 22nd. That affidavit recounts consultation with Fishman and it was then:

> "clear that the defective sources raised a problem under the warranty." (affidavit of Dr. Welt of October 22, 1982, cited in the preceding

46/ R. 569

section). 47/

That conclusion was petitioner's. What Fishman said that contributed to that conclusion is neither averred or to be inferred from the affidavit of Dr. Welt.

Thus, the sworn documents before the Court (Judge Ramsey) in January of 1983 raised the following disputes of fact:

(1) Did Arkansas refuse entry of Respondent's Cobalt-60 to Peitioner in April of 1982? 48/

(2) Did Arkansas admit the Cobalt-60 only on the express condition that it was to be reencapsulated wihtin one year of entry? 49/

(3) Was this condition on entry recommended by the representative of the Nuclear Regulatory Commission, (Taboada)? 50/

47/ R. 569
48/ App. E-1; App. G-1; R. 627
49/ Ibid.
50/ App. E-1; R. 667

(4) Did Respondent undertake (in April of 1982) to reencapsulate the cobalt-60 within one year of its entry, and at no cost to Petitioner? 51/

(5) Was it in reliance on this undertaking by Respondent to Petitioner that Petitioner submitted its request to Arkansas' Health officials (on April 2, 1982) that they permit entry of the Covbalt-60 into Arkansas under the condition that the Cobalt-60 be reencapsulated within one year after entry? 52/

(6) Was this undertaking by Petitioner, made in reliance on an undertaking by respondent (to reencapsulate within one year at no cost to Petitioner) the sole means by which Petitioner could receive delivery of Respondent's Cobalt-60 at its subsidiary's plant in West Memphis, Arkansas in April of 1982? 53/

51/ App. E-1; R. 627
52/ Ibid.
53/ Ibid.

(C) RESURRECTION OF PETITIONER'S MOTION 17 MONTHS LATER IN RESPONDENT'S RULE 11 MOTION:

Against this backdrop of disputed fact, this Court is asked to look closely at Respondent's Rule 11 motion, and the procedures that followed. 54/ First, the Rule 11 motion was filed on May 4, 1984 slightly less than 17 months after the disposition of of Petitioner's motion for preliminary injunction in the proceeding before Judge Ramsey. Second, Respondent's Rule 11 motion dealt solely with the sworn statements of Dr. Welt in support of the motion for preliminary injunction, and Petitioner's prosecution of it, 17 months earlier in the proceeding before Judge Ramsey.

Third, the only notice form the court on what was scheduled on May 30th was the Court's letter to both Counsel on April 18th stating that a hearing was scheduled for May 30th on Respondent's motion for summary judgment without mention of the Rule 11

54/ App. I-1

Motion 55/ That is the full extent of notice to Petitioner of what was to occur on May 30th.

As noted, on May 30, after day-long argument on summary judgment (and an adjournment taken by Judge Gray to examine the voluminous papers filed in the case) Judge Gray at the close of argument on summary judgment moved directly, nearly imperceptibly to his award of fees under Rule 11. The entire proceeding on the Rule 11 motion lasted less than ten minutes after a day of argument on the summary judgment motion. 56/ On reason for Judge Gray's haste was the fact that he was leaving Baltimore to return to Los Angeles on the following day. In those ten minutes on May 30, 1984 Judge Gray moved past summary judgment directly to his award of fees under Rule 11.

It is essential to note that Petitioner received no notice that Respondent's Rule 11 motion was to be

55/ App. J-1; As stated, supra, Respondent wrote Judge Hargrove on May 9 seeking a hearing on both its motion for summary judgment and the Rule 11 motion (App K-1) Petitioner, by letter to Judge Hargrove on May 16, oppose (App. L-1); As indicated the sole note to Petitic was Judge Hargrove's letter to Counsel on April 18 scheduling only hearing on Respondent's motion for summa judgment. (App. J-1).

56/ Judge Gray's entire oral ruling on the Rule 11 motion is at R. 78 to R. 89.

heard on May 30th. If Petitioner had been notified that it would be heard on May 30, Dr. Welt would have been in the courtroom on May 30th to testify in person as to the truth of his sworn statments (some 19 months earlier in the preliminary injunction proceedin and each of Respondent's affiants (in the preliminary injunction proceeding) Ransohoff, Taboada, Bevill, Fishman and Turkanis would have been subpoenaed for cross-examination. 57/ That is especially true regarding Bevill, whose affidavit was far from complete and presented a distorted image of Arkansas' position immediately prior to April 2, 1982, but whose affidavit, nonetheless, was heavily relied on by Judge Gray.

57/ Ransohoff would be cross-examined on the basis for Respondent's request to Arkansas to allow Respondent's sources in as they were. Bevill would be cross-examined on the precise position taken by Arkansas before Arkansas received a commitment to reencapsulate within one year. Taboada would be cross-examined on precisely what he told Dr. Welt from Respondent's office in Dickerson, Maryland, on Taobaoda's visit to examine the micro-cracks. Turkanis would be cross-examined on why he wrote his letters of April 1 and April 2, 1982, to Bevill, and what Arkansas' position concerning entry of Respondent's sources was on those dates. The results would be a far cry from that set out in the paper record.

None of those five witnesses were in the Courtroom except Ransohoff 58/ because no notice had been given to Petitioner that Respondent's Rule 11 motion was to be heard that day.

(D) JUDGE GRAY'S FINDINGS

With disputes of sworn fact sharply etched between Dr. Welt and Ransohoff, between Dr. Welt and Taobada, and with Bevill's affidavit never revealing whether Arkansas refused entry to Respondent's sources (which Dr. Welt repeatedly swore Arkansas did) Judge Gray's resolution of these disputes was remarkable. In his Findings 32 through 53, 58A/ Judge Gray accepted Respondent's affiants averments in their entirety and flatly rejected those of Dr. Welt in their entirety.

Judge Gray never indicated how he arrived at these findings; there was no rationale spoken from the bench justifying the acceptance of Respondent's affidavits as being truthful and the rejection of Petitioner's as a pack of lies. There could

58A/ App. A-11 to 17.

58/ Ransohoff was in the Courtroom as an observer. The brevity of Judge Gray's Rule 11 proceeding precluded any testimony, and Ransohoff's testimony was worthless unless Dr. Welt was also put on the stand. It so happened that Dr. Welt was out of the country on May 30, 1984, because neither Petitioner nor its counsel had any idea that the Rule 11 motion was to be adjudicated that day.

be none. Determinations on disputed facts necessarily follow after hearing witnesses in person and seeing them. Certainly the papers before Judge Gray provided no basis for those determinations. Any objective examination of the papers before Judge Gray on May 30, 1984 would result in a hearing, so that the opponents' affiants would have an opportunity to testify in support of their verison of the facts and then be cross-examined by the other side.

That simple requirement of fairness did not deter Judge Gray on May 30, 1984.

Within 10 minutes, and after hearing no testimony whatsoever, without prior 59/ notice to Petitioner (or Respondent) Judge Gray speedily determined who was telling the truth and who was lying in sworn testimony on disputed facts. Judge Gray determined that Bevill was telling the truth and Dr. Welt was not (Findings 41-44); seized on Fishman's affidavit and the fact that Fishman was never "hired" by Petitioner, nor did Fishman examine the sources (Findings 45 through 49), determined that Taboada and Bevill were telling the truth and Dr. Welt was not.

59/ The first inkling that Judge Gray was considering Rule 11 sanctions came late in the morning session on May 30 (at R. 50). Significantly it arose over whether Arkansas refused (or did not refuse) to admit Respondent's sources as they were before April 2, 1982. Judge Gray considered a session on the following day (before his return to Los Agneles on that day, May 31). But it was an impossibility for Petitioner to bring his witnesses on such notice; Dr. Welt was out of the country; subpoenaing Respondent's affiants on such notice was also impossible. And Judge Gray made his award on May 30 without further consideration of live testimony.

Then Judge Gray determined that Ransohoff was telling the truth when he swore tht Dr. Welt voluntarily offered to reencapsulate within one year (Finding 51); 59A/ Judge Gray found that Dr. Welt was not telling the truth when he swore in affidavits and in deposition that Arkansas refused entry of Respondent's Cobalt-60 unless it secured a commitment of reencapsulation within one year of entry.59B/

In Finding 52 Judge Gray simply departed from the record entirely. He found that Arkansas' review resulted in the lifting of all restrictions on Respondent's sources. That simply is not true. 60/

59A/ Finding 43; App. A-15
59B/ Finding 51; App. A-17
60/ Indeed, Respondent's sources remain under a cloud today. Arkansas has specifically recommended that Respondent's sources may not be transferred to another user, nor taken out of Arkansas (e.g. to Petitioner's plants elsewhere9 without a costly metallurgical evaluation. These are not the sources that Petitioner bargained for. (See page 5 of the Arkansas license to Petitioner dated August 17, 1983 (R.705) and the affidavit of Dr. Welt of March 19, 1983 R. 711-716)

Each of these findings were in fact trial findings. Of course there was no trial, nor any testimony on the issues found in Judge Gray's Findings 41 through 52. Nonetheless, Judge Gray made those findings (41 through 52) the basis of his ultimate findings, Finding 53, quoted in haec verba on page 7 of this petition.

Finding 53 was the factual base which Judge Gray used as support for his award of $26,500 to Respondent element of that factual base is disputed by Petitioner. There was no way that Judge Gray could properly reach those findings on a paper record. But he did. 60A/

(E) THE CONCLUSIONS OF LAW AND THE GRANT OF SUMMARY JUDGMENT IN THIS CASE WERE WHOLLY IMPORPER.

All 55 findings of fact entered by Judge Gray dealt with Respondent's Rule 11 motion. That motion absorbed Judge Gray's full attention. Nowhere in Judge Gray's findings does he deal with the facts disputed by the parties (and crucial to the disposition of Respondent's motion for summary judgment on: (1) issue

---

60A/ Judge Gray's findings of fact 17 months after a proceeding before another Judge extended to Findings 25 and 31 on issues that had been withdrawn--without protest from Respondent--in the proceeding before Judge RAmsey. Withdrawn as issues, Judge Gray made findings (25 and 31) nonetheless, and made them on facts just as hotly disputed

of petitioner's entitlement to curies under the contract, (2) the breach by respondent of the "best efforts" obligation to deliver curies on December 31, 1982 and January 31, 1983, and (3) the issues of the six sources which were out of specification. (4) Obviously, too, there were major disputes of fact on the reencapsulation issue.

What Judge Gray did was to try this case on its merits, without witnesses, without testimony, without cross-examination. He did so on the papers before him. The findings of ultimate fact made by Judge Gray under Rule 11, findings on each major issue in the case, depart totally from proper conduct under Rule 56. Those findings on disputes of fact arising in the papers before Judge Gray invalidate Judge Gray's grant of summary judgment in favor in Respondent. Judge Gray's tour de force on May 30, 1984 was a trial of this case on its merits. It was not, and in light of Judge Gray's findings, it could not be, a proper disposition of a motion for summary judgment. Accordingly, Petitioner seeks reversal

of the entry of summary judgment against it. Petioner has never had its day in court on the disputed issues of fact in this case.

(E): PETITIONER WAS DEPRIVED OF DUE PROCESS BY JUDGE GRAY'S ENTRY OF THE AWARD OF $26,500 ON MAY 30, 1984;

(i)

Petitioner will be precise in delineating the deprivation of the due process it suffered before Judge Gray on May 30, 1984. Petitoner was never notified that Respondent's Rule 11 motion would be considered that day; accordingly, Petitioner did not have an opportunity to be heard before the award against it was entered. "Being heard" in the context of Rule 11 is the opportunity to present your affiants (who are accused of false averments on disputed facts and "bad faith") to

testify in open Court as to the truthfulness of their averments, and an opportunity to cross-examine your opponents' affiants in open Court to demonstrate that their sworn averments, on these disputed facts, were false. Whatever the broad area of discretion vested in the trial Court under Rule 11 may be, it must stop short of this basic due process requirement. This is especially true under Rule 11, whose sanctions are as grave as any found in civil procedure. Notice and an opportunity to be heard are the essentials of due process in any context; and especially in a proceeding under Rule 11. Judge Gray denied this due process to petitioner on May 30, 1984. Petitioner was never notified that Respondent's Rule 11 motion was to

be heard that day. Thus Petitioner was precluded from having both his own affiants and those of his opponent in court for a hearing before the Court entered an award of $26,500 against Petitioner in violation of Petitioner's due process rights. That is Petitioner's position.

(ii)

Notwithstanding the paucity of authority on proceedings under Rule 11, there is case and commentary support for Petiitoner's position that due process is required under Rule 11. In the matter of Los Angeles County Pioneer Society., 217 F2d 190 (C.A. 9, 1954) the Ninth Circuit was confronted with an order of the trial court entered under Rule 11, permanently disbarring the appellant, a Los Angeles lawyer. It was

appellant's contention that he was not notified of the disbarment proceedings, and was not given an opportunity to oppose it. In that case there was also an order of disbarment already prepared by the trial court at the conclusion of the hearing (on another issue) below, which Appellant had no opportunity to oppose. Judge Denman, speaking for the Court, recited with approval the court's earlier opinion in U.S. v. HIcks, 37 F2d 289:

"Of the above we stated as follows:

> "Without further discussing the facts, we are clearly of the opinion that until near the close of the hearing appellant had not thought that personally he was on trial for disbarment or contempt or for any other cause or purpose; and, further that the view expressed in the foregoing comment are erroneous. It may be that an attorney can be summarily disbarred without a

hearing for misconduct commited in the presence of the court. see, however, Bradley v. Fisher, 13 Wall. 335, 355, 80 U.S. 335, 20 l.Ed. 646. But that question we need not decide, for no such case is here presented. It may also be admitted that the rules of practice in a disbarment proceding are more flexible than those prevailing in criminal cases, and that a formal charge is not indispensable. Randall v. Bridgham, 7 Wall. 523, 74 U.S. 523, 19 L.Ed. 285; Thatcher v. U.S. 6 Cir., 212 F. 801. But that is not to say that an attorney can be disbarred without a charge in some form. No case has been brought to our attention supporting such a view, and it would seem to be out of harmony with fundamental conceptions of justice. In the two cases cited, supra, upon which the District Attorney relies, it is clearly recognized as indispensable that the subject of such a proceeding be advised of the proposed action and of the basis therefor, and that he have his "day in court". In other words, he must in advance be informed of the purpose of the proceeding and of the grounds therefor, and be afforded a fair opportunity to interrogate the witnesses testifying against him and to produce evidence in refutation or rebuttal. *** See also

> Ex parte Bradley, 7 Wall. 364, 74 U.S. 364, 19 L.Ed. 214; Bedley v. Fisher, 13 Wall. 335, 354, 80 U.S. 335, 354, 20 L.Ed. 646; Ex parte Robinson, 19 Wall. 505, 512, 86 U.S. 505, 22 1.Ed. 205."

The Ninth Circuit held that the imposition of sanctions under Rule 11 (and Pioneer Society was a rule 11 case) required notice and hearing before award; the court stated this was historically the law, citing Ex parte Garland, 4 Wall 333, 71 U.S. 333, 18 L.Ed. 366.

> "They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the Court and after opportunity to be heard had been afforded. Ex parte Heyfron, 7 How., Miss., 127; Fletcher v. Daingerfield, 20 Cal. 427, 430." (emphasis supplied).

The Ninth circuit also cited Ex Parte Robinson, 19 Wall. 506, 8 U.S. 505, 22 L.Ed. 208.

> "Before a judgment disbarring an attorney is rendered, he should have notice of the ground of complaint agianst him and ample opportunity of explanation and defense. This is a rule of natural justice and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. *** The principal that there must be citation before hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression where ever power may be lodged."

In Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390 .Ed. 767, this Court held that even if there exists an admission of contempt justifying sanctions, due process in the sanction proceding is required:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issues of complete exculpation or in

> extenuation of the offense and in mitigation of the penalty to be imposed."

Promulgation of Rule 11 changed nothing; the disbarring authority (in Pioneer Society) relied on Rule 11 to justify its conduct below. The Ninth Circuit in Pioneer Society rejected this:

217 F2d. at 194:

> "Nothing in this rule" (Rule 11) "purports to say that it is due process to disbar a lawyer for a contempt, not committed in or near the presence of the Judge trying a case, without notice of the charge or an opportunity to be heard. The rules of civil procedure are prescribed by the Supreme Court, 28 U.S.C. 2072. It is irrational to assume that the Supreme Court, in prescribing Rule 11, for "appropriate disciplinary action" intended to create such a jeopardy for an attorney and thereby in effect overrule its decisions cited above.

In Pioneer Society, the Ninth Circuit reversed the trial Courts' order of disbarment.

On need not add that the requirments

of due process must be adhered to if the sanction sought under Rule 11 is $26,500 just as they must be adhered to in disbarment proceedings under Rule 11. Notice and hearing were denied Petitoner in this case. Both are essential to due process.

(iii)

The Fourth Circuit brushed aside the irregularities in the Rule 11 proceeding before Judge Gray with the statement:

> "we see no merit in the several arguments that there were procedural irregualrities in the adjudication of Neutron's motion for an award of attorneys' fees" (App C-4)

Those "procedural irregularities' deprived Petitioner of the opportunity to be heard as to the truthfulness of its affiants' averments before the Rule 11 award was made. Those "procedural irregularities' permitted the entry of the award without any notice to Petitioner that the Rule 11 motion was to be

heard on the day that the award was made. Those "procedural irregularities" deprived the President of this company, Dr. Martin Welt, of the opportunity to stand before the Court and in open Court testify in his own defense before the Court branded him a liar. Those "procedural irregularities" deprived Dr. Welt (and his counsel) of the right to confront Jackson Ransohoff, Bernard Bevill, Alfred Taboada and Steven Fishman with <u>their</u> sworn statements, force them to defend those statements in open court on cross-examination <u>before</u> their statments were accepted as the truth and those of Dr. Welt as untruths. Those "procedural irregularities" prevented the trial court from seeing affiants on the witness stand, in person, when these affiants had sworn on paper to facts totally disputing each other, so that the finder of fact could then ascertain where the truth is.

Those "procedural irreguarities", if they are the law of the Fourth Circuit, place that circuit wholly at odds with the Ninth Circuit's determination of the law in Pioneer Society, cited above.

More importantly, those "procedural irregularities" go to the very guts of due process. They occurred in a case where an accomplished engineer, a scientist, found his veracity and reputation undermined by a Court which never saw him, and never saw those who disputed his word. If Pioneer Society dealt with the right to practice law, Radiation Technology deals with the sanctity of a man's reputation.

That reputation, as does every reputation, deserves due process before it is maligned. That is what this case is all about.

(iv)

Conceding that a trial court must be given broad latitude in imposing sanctions, Professor Moore states that there are rules (beyond those of due process) which apply in Rule 11 proceedings;

> "A party seeking sanctions" (under rule 11) "should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary. Moore's, Federal Practice, vol. 2A., Rule 11, page 11-7, para. 11.01 (40). (emphasis supplied).

What occurred in the brief Rule 11 proceeding, and the award of sanctions by Judge Gray on May 30, 1984, violated at least four of these rules. First, Respondent waited 17 months with its grievance before it filed its Rule 11 motion seeking sanctions. Second, Respondent did not seek sanctions at the time when petitioner's motion for preliminary injunction was withdrawn by Petitioner on June 18, 1983 nor "shortly thereafter." Respondent waited 17 months. Third, Judge Gray's procedure in making the rule 11 award did not comport with due process requirments. Fourth, it was not Judge Gray's participation in the proceeding that "provide(d) him with full knowledge of the relevant facts" concerning Petitioner's preliminary injunction motion and Respondent's grievance concerning it. The judge who had participated in the preliminary

injunction proceeding was Judge Ramsey, not Judge Gray. Indeed, Judge Gray stated plaintively on May 30, 1984;

> "Gentlemen, I wish I have time to study this entire record." 61/

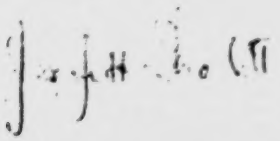
But Judge Gray was the wrong judge, acting at the wrong time, following wrong procedures when he made his Rule 11 award on May 30, 1984.

If this example of Rule 11 proceedings is not corrected there will be one place in our law where due process and fair procedures are no longer part of the law. That place will be in Rule 11 of the Federal rules of Civil Procedure. Rule 11 should certainly preserve a trial court's full right to exact sanctions; No one suggests otherwise. But Rule 11 must be enforced in consonance with due process and fairness.

61/ R. 44

It was not in this case. This Court's review of the abuse of Rule 11 in this case is required lest Radiation Technology stand as precedent approving the abandonment of due process requirements in all Rule 11 proceedings in every federal court in the land.

Respectfully Submitted,



Joseph H. Sharlitt
1750 Pennsylvania Avenue, N.W
Washington, D.C. 20006

(202) 393-4940

Counsel to Petitioner
Radiation Technology, Inc.

Dated: December 31, 1985.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RADIATION TECHNOLOGY, INC.,	)	
	)	
Plaintiff,	)	Civil Action
	)	No.HAR-82-2245
v.	)	(Assigned to Visit-
	)	ing Judge William
NEUTRON PRODUCTS	)	P. Gray
	)	Central District
Defendant.	)	of California)
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING DEFENDANT NEUTRON PRODUCTS' MOTION FOR SUMMARY JUDGMENT AND TO RECOVER COSTS, EXPENSES AND ATTORNEYS' FEES

Defendant Neutron Products, Inc. ("Neutron") having filed a motion for summary judgment and to recover costs, expenses and attorneys' fees, a hearing having been held on May 30, 1984, and the arguments of the parties, through their counsel, having been heard and considered, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Introduction

1. This action was commenced on August 13, 1982 by plaintiff Radiation Technology, Inc. ("Radiation") against defendants Neutron Products, Inc. ("Neutron") and Jackson A. Ransohoff ("Ransonhoff"), the president of Neutron.

2. The original complaint filed by Radiation, verified by its president Martin Welt, Ph.D., ("Welt"), sought money damages an injunctive relief bacause of Neutron's alleged breach of a written Agreement signed in September 1981 with Radiation concerning delivery by Neutron to Radiation of a number of sealed stainless steel containers, called "sources," containing the radioactive isotope Cobalt-60.

3. Cobalt-60 is a radioactive material with a variety of applications in medicine and industry, and is produced as an intended by-product of

nuclear reactors. It is quantitatively measured in term of "curies," a measure of its level of radioactivity. In order to be used in commercial irradiators of the type operated by plaintiff Radiation, Cobalt-60 is double encapsulated in stainless steel containers to produce "sources". Neutron produces Cobalt-60 and encapsulates it into sources for its own use and for sale to other licensed users, such as Radiation.

4. In 1980, the Department of Energy ("DOE") had made available for public auction a quantity of Cobalt-60 it no longer wanted contained in three hundred eight (308) "targets", located at DOE's Savannah River facility.

5. Neutron and Radiation were the only two initial bidders for this Cobalt-60, but a dispute arose concerning the bidding procedures followed by DOE, and a bid protest was filed on behalf of Neutron.

6. The Agreement which is the subject of this action was entered into by Neutron and Radiation in compromise of this dispute.

7. The Agreement provides, in essence, that Neutron was to acquire the Cobalt-60 contained in the three hundred eight (308) targets, and deliver to Radiation a quantity of Cobalt-60 encapsulated in stainless steel sources, but the precise amount of Cobalt-60 to be delivered by Neutron to Radiation depended, according to the Agreement, on the number of curies contained in the disputed targets and on what was made available by DOE.

8. In its verified complaint filed in this action, Radiation alleged, inter alia, that Neutron had delivered to it only 1,088,900 curies of Cobalt-60 when the Agreement in fact entitled Radiation to the receipt of 1,529,270 curies of Cobalt-60; that Neutron had delivered to it six (6) sources of Cobalt-60 which were below

specifications and hence of substantially impaired utility; that all seventy-six (76) sources of Cobalt-60 delivered to Radiation by Neutron were defective and in breach of warranty; and that the regulatory authorities in the State of Arkansas considered these sources to constitute a safety hazard because of faulty encapsulation and had ordered that they be re-encapsulated within one year.

9. On August 17, 1982, based on its verified complaint, RADIATION filed a motion for preliminary injunction seeking that this Court order that Neutron deliver to it within thirty (30) days, free of charge, sources of Cobalt-60 containing 430,370 curies, that Neutron deliver to it within thirty (30) days, also free of charge, an additional 72,000 curies of Cobalt-60 to replace the six sources alleged to be of substantially impaired utility, and that Neutron satisfy the regulatory

authorities by April 30, 1983, that the sources met the contractual warranty and that all alleged "flaws" in the capsules had been corrected.

10. In its motion, Radiation contended that the irreparable harm which it was suffering could only be arrested by "this Court's rapid equitable intervention."

11. On September 8, 1982, Neutron served its memorandum in opposition to Radiation's motion, along with the affidavit of Jackson A. Ronsohoff dated September 8, 1982 ("the Ransohoff Affidavit of September 8, 1982").

12. Radiation did not seek a hearing on the preliminary injunction after filing it, but rather served an additional supporting memorandum on September 29, 1982, together with an unexecuted affidavit of Dr. Welt. Dr. Welt executed this affidavit on October 22, 1982 ("the Welt Affidavit of October 22, 1982").

13. On December 14, 1982, Radiation's counsel informed Neutron's counsel that the hearing on the motion for preliminary injunction was scheduled for December 22, 1982. At that time, Radiation's counsel also informed Neutron's counsel that the motion had now been limited to the single issue concerning the alleged breach of warranty and the alleged "flaw" in the encapsulation. The issues concerning the amount of total curies of Cobalt-60 to be delivered and the replacement curies to be delivered were dropped from the motion.

14. The December 22, 1982, hearing was subsequently cancelled by Radiation and rescheduled for January 21, 1983.

15. On January 11, 1983, Radiation served another memorandum in support of its motion and an additional affidavit of Dr. Welt dated January 10, 1983 ("the Welt Affidavit of January 10, 1983").

16. On January 18, 1983, Neutron filed a

supplemental memorandum in opposition to Radiation's motion for preliminary injunction, along with affidavits of Bernard Bevill, Alfred Taboada, Steven Fishman, Ray G. Fasiczka and a supplement affidavit of Jackson A. Ransohoff ("the Ransohoff Affidavit of January 18, 1983").

17. On January 18, 1983, the same day Neutron served the above-referenced affidavits on Radiation's counsel, Radiation's counsel informed Neutron's counsel that the motion for preliminary injunction had been taken off calendar. It was never rescheduled.

Radiation's Demand For Delivery
Of 430,370 Curies of Cobalt-60

18. Radiation, in its motion for preliminary injunction, sought an order that required Neutron and Ransohoff to deliver to it 430,370 curies of Cobalt-60, free of charge, allegedly in accordance with the September 8, 1981 Agreement.

19. This demand was based on the allegations in the complaint, verified by Dr. Welt, that Radiation was entitled under the Agreement to received 1,529,270 curies at $.55 per curie that Radiation had "fulfilled each payment term incumbent of it under the Agreement," but had received only 1,088,900 curies.

20. Contrary to the claims in the verified complaint, the Agreement does not provide that Radiation is entitled to receive 1,529,270 curies of Cobalt-60.

21. The Agreement, in fact, provides that Radiation is entitled to receive no more curies of Cobalt-60 than the amount actually made available to Neutron by DOE.

22. The pertinent language of the Agreement, contained in paragraphs 1 and 8, states:

> Paragraph 1:
>
> NEUTRON shall furnish double encapsulated cobalt-60 sources in an even number of capsules in accordance with NPI Drawing

Number 200226, a copy of which is attached hereto, and made a part hereof. The number of curies contained in said sources shall be within 10,000 curies of the amount of cobalt-60 received by NEUTRON from the department of Energy pursuant to the provisions of Article 8 of this Agreement, less an allowance of 3% for decay in processing.

Paragraph 8:

. . . It is recognized by the parties that the cobalt actually delivered under this Agreement shall be selected by NEUTRON without regard to point of origin or lot number. Nevertheless, it is understood that NEUTRON is relying on the availability of the cobalt-60 that was offered by the Department of Energy in its offer of February 25, 1981 to use, or to replace any other inventory used in filling deliveries under this Agreement; and in the event of a shortfall in the delivery of DOE furnished cobalt-60 to NEUTRON below the anticipated delivery of 1,300,000 curies pursuant to the above referenced offer, the quantity of curies delivered under this Agreement shall be decreased by the amount of such shortfall in the delivery of DOE furnished cobalt-60 to NEUTRON below the anticipated delivery of 1,300,000 curies pursuant to the above-referenced offer, the quantity of curies delivered under this Agreement shall be decreased by the amount of such shortfall. Similarly, the

quantity shall be increased by the amount of any surplus above 1,300,000 curies delivered pursuant to the said offer at the same unit price of $0.55 per curie. .

23. There were 1,082,732 curies of Cobalt-60 made available to Neutron by DOE and, under the term of the Agreement, Neutron was required to deliver no more than 1,040,250 curies to Radiation. Neutron delivered 1,088,900 curies of Cobalt-60 to Radiation, complying with the Agreement.

24. Contrary to the claim in the verified complaint, Radiation did not pay for 1,529,270 curies of Cobalt-60. Radiation only paid for 1,088,900 curies of Cobalt-60, the amount it received.

25. The claims in the verified complaint, which formed a basis for the motion for preliminary injunction, that Radiation was entitled to receive 1,529,270 curies of Cobalt-60 for which it had paid in full and that it needed equitable relief to prevent irreparable injury to it because of

Neutron's alleged failure to deliver all of these curies, were made without any factual support, and either in actual bad faith or with such a reckless disregard of the truth as to constitute bad faith.

Radiation's Demand For Delivery Of Six (6) New Sources of Cobalt-60

26. Radiation, in its motion for preliminary injunction, sought an order that required Neutron and Ransohoff to deliver to it six (6) new sources of Cobalt-60, a total of 72,000 curies, because it claimed that six (6) of the sources delivered to it were below specifications.

27. This demand was based on allegations in the complaint, verified by Dr. Welt, that the ability of Radiation to use these sources was substantially impaired and that Radiation was entitled to a complete replacement for all of them.

28. According to the Agreement, the activity level of each source was to be between 12,000 and

20,000 curies, with an average activity level of 13,500. Five sources delivered by Neutron had activity levels of 11,310, 11,810, 11,770, 11,970 and 11,460 curies, respectively.

29. Contrary to the allegations in the verified complaint, Dr. Welt subsequently admitted in his deposition that these sources had been accepted, used continuously, and that their value was not substantially impaired.

30. Robert Buckley, the manager of operations at Radiation's subsidiary's plant in West Memphis, Arkansas, also admitted that the level of activity of each source was learned prior to or at the time of delivery, that all sources were nevertheless accepted and that all sources were used.

31. The claims in the verified complaint, which formed a basis for the motion for preliminary injunction, that Radiation's ability to use six (6) sources was substantially impaired and that it

therefore needed equitable relief, were made without any factual support, and either in actual bad faith or with such reckless disregard of the truth as to constitute bad faith.

Radiation's Claims Concerning The Safety Of The Sources of Cobalt-60

32. Radiation, in its motion for preliminary injunction, sought an order which required Neutron and Ransohoff to satisfy the regulatory authorities by April 30, 1983, that the sources met the contractual warranty and that all alleged "flaws" in the capsules had been corrected. Radiation's verified complaint alleged that all seventy-six (76) sources had to be re-encapsulated because of a requirement imposed by the State of Arkansas.

33. During the process of encapsulation of the Cobalt-60 sources by Neutron before their delivery to Radiation, microcracks were discovered in the welds of quality control sections taken from

sources sampled.

34. Upon discovery of these microcracks, Neutron suspended further encapsulation of the Cobalt-60 and deferred a scheduled delivery to Radiation's subsidiary's plant in West Memphis, Arkansas pending an analysis of the significance of the microcracks.

35. To assist in the analysis, Neutron retained the service of an independent consulting firm, O'Donnell & Associates, Inc. to review the metallurgy and conduct a stress analysis.

36. The report of O'Donnell & Associates, Inc. issued in March 1982 and attached to the Affidavit of Ray G. Fasiczka, filed with the Court, concluded that the sources would maintain their integrity for their expected useful life and that the microcracks would not propagate more than half-way through the wall of the source for approximately 2000 years.

37. Nevertheless, Radiation filed and maintained its motion of preliminary injunction based on allegations in the complaint, verified by Dr. Welt, that the "State of Arkansas has determined that such cracks pose a radioactive threat unacceptable to it."

38. In support of its motion for preliminary injunction, Radiation further alleged in its complaint, verified by Welt, that the State of Arkansas "required that Radiation recapsule all 76 sources within one year."

39. In support of its motion for preliminary injunction, Radiation also alleged in its complaint, verified by Dr. Welt, that because of these microcracks "there is an imminent threat to the safety of individuals working in proximity to these faulty sources and a threat to the safety of the public."

40. Dr. Welt, in the Welt Affidavit of

October 22, 1982, filed in further support of Radiation's motion for preliminary injunction, stated:

> In paragraphs 13, 14 and 15 of his affidavit, Ransohoff again admits the existence of defects in the sources, but argues that State of Arkansas is wrong in its view a safety threat exists which requires re-encapsulation of these sources.
>
> The true facts are that following examination the defective sources by a consultant hired by our company, Steven Fishman, Ph.D., it was clear that the defective sources raised a problem under the Warranty given by Defendant NP. Defendant NP then consulted officials of the Nuclear Regulatory Commission, and it was the recommendation of one such official made in Defendant NP's office, that the equirement be imposed on Defendant NP to re-encapsule the defective sources within one year. That NRC recommendation was then accepted by the State of Arkansas.

41. Contrary to the sworn allegations in Radiation's verified complaint, in an affidavit filed with the Court, Mr. Bernard Bevill, Chief of Inspections and Compliance in the Division of

Environmental Protection of the State of Arkansas Department of Health stated that "At no time did the State of Arkansas determine that the existence of the microcracks in the sealed sources posed an unacceptable radioactive threat."

42. Contrary to the sworn allegations in the verified complaint, Dr. Welt admitted in his deposition that he had no idea whether the State of Arkansas ever made such a determination.

43. Contrary to the sworn allegations in Radiation's verified complaint, Mr. Bevill stated in his affidavit that Dr. Welt specifically requested that the license be issued by Arkansas for only one year and that Dr. Welt voluntarily undertook to have the sources re-encapsulated within one year.

44. Contrary to the sworn allegations in Radiation's verified complaint, Mr. Bevill stated in his affidavit that the State of Arkansas never

"determined that the sources are defective or faulty, or that they pose an imminent threath to the safety of Process Technology's workers or to the safety of the public."

45. Contrary to the sworn allegations in the Welt Affidavit of October 22, 1982, Dr. Steven Fishman, in his affidavit filed with the Court, stated that he was never hired by Radiation or by Welt, who is his cousin, as a consultation but was simply asked to review reports of the investigation of the microcracks.

46. Contrary to the sworn allegations in the Welt Affidavit of October 22, 1982, Dr. Welt admitted in his deposition that Dr. Fishman was never paid for his efforts.

47. Contrary to the sworn allegations in the Welt Affidavit of October 22, 1982, Dr. Fishman, in his affidavit, also stated that he never examined the sources, he never determined that they

were faulty, and he never determined that they raised a problem under Neutron's warranty.

48. Contrary to the sworn allegations in the Welt Affidavit of October 22, 1982, Dr. Welt admitted in his deposition that Dr. Fishman never examined the sources and never told him that the sources raised a problem under the warranty.

49. Contrary to Dr. Welt's sworn allegations, Alfred Taboada, the NRC official who reviewed the evaluation of the microcracks and discussed this matter with Mr. Bevill of the State of Arkansas, in an affidavit filed with the Court, stated that

> At no time did I recommend to any Arkansas official that the subject source containers be licensed for only one year or suggest a requirement that the sources be re-encapsulated at the end of one year's use. I personally am unaware of any such recommendation of request being made by any NRC official.

50. Mr. Bevill stated in his affidavit that the State of Arkansas never received such a recommendation from the NRC.

51. On January 18, 1983, three days before the scheduled hearing on the motion for preliminary injunction, Radiation for the first time asked the Arkansas regulatory authorities for an extension of its license, postponing the re-encapsulation of the Cobelt-60 -- which re-encapsulation Dr. Welt had voluntarily agreed to undertake -- until October 1983.

52. In October 1983, Arkansas issued a new license to Radiation's subsidiary which contained no restrictions on the use of the sources and did not require th eir re-encapsulation.

53. The claims in the verified complaint and the Welt Affidavit of October 22, 1982, which formed a basis for the motion for preliminary injunction, concerning the safety of the sources, the alleged governmental requirements that they be re-encapsulated, and the alleged need for equitable relief to make the source safe and to force

Neutron to re-encapsulate them, were made without any factual support, and either in actual bad faith or with such a reckless disregard of the truth as to constitute bad faith.

54. Inasmuch as attorney fees will be awarded to the defendant, the Court now makes findings with respect to the relevant factors that should be taken into account in fixing such fees, as prescribed and enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974):

(1) The time and labor required. Counsel for the defendant report having spent $31,475.00 worth of their time in connection with the matter here concerned. This was computed at the rate of $160.00 per hour for R. Timothy Hanlon, Esq. and $105.00 or $110.00 per hour for Richard Galen, Esq. These gentlemen have been practicing for twenty-four years and nine years respectively,

and the Court concludes that these sums represent reasonable hourly rates for lawyers of their experience in Washington, D.C. and Baltimore, Maryland.

However, ther clearly was some substantial duplication and overlapping of effort for which their opponents should not be charged. Accordingly, the Court reduces the time and labor required to $25,000.00 in fixing fees.

(2) The novelty and difficulty of the questions. The questions here concerned were not particularly novel or difficult for lawyers of the experience that these two gentlemen had enjoyed.

(3) The skill required to perform the legal services properly. The record indicates a workmanlike job, such as should be expected of the gentlemen concerned.

(4) Awards in similar cases. I am not personally familiar with awards in similar cases in

Maryland or the District of Columbia. However, I believe that awards in such areas are generally comparable to those made in Los Angeles, California, and I believe that $25,000.00 is within the area of customary awards for comparable services in that city.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action by reason of the parties' diverse citizenship. 28 U.S.C. § 1332.

2. A party is entitled to summary judgment if the pleadings, depositions, interrogatories and adminissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P.

3. A party against whom a properly supported motion for summary judgment is brought much set

forth, by affidavit or as otherwise allowed by law, specific facts showing there is a genuine issue for trail. Tule 56(e), Fed. R. Civ. P.; Zoby v. American Fidelity Co., 242 F.2d 76 (4th Cir. 1957).

4. The Agreement between Neutron and Radiation defines the contractual rights of the parties.

5. The Agreement is to be interprete pursuant to the laws of Maryland.

6. As used in the Agreement, "best efforts" is a term which necessarily takes its meaning from the circumstances. Polyglycost Corp. V. G.P.C. Distributors, Inc., 534 F. Supp. 200 (S.D. N.Y. 1982).

7. Whether Neutron exerted its best efforts in the context of the Agreement between Neutron and Radiation, depends on wheher Neutron's actions were that of an average, prudent, competent company. Arnold Productions, Inc. v. Favorite

Films Corp., 176 F. Supp. 862 (S.D. N.Y. 1959), aff'd, 298 F. 2d 540 (2d Cir. 1962).

8. Radiation, having accepted and having used non-conforming goods, i.e., the Cobalt-60 sources below the 12,000 curie specification, is barred from rejecting those goods and is barred from any further remedy with regard to them. Maryland Code Ann., Comm. Law § § 2-602(1), 2-606, 2-607(2), 2-607(3), 2-714(1) (1975).

9. Neutron, as a seller of goods, has the right to provide a limited warranty which excludes other warranties and which also limits the remedies of the buyer, Radiation, in the event of a breach of warranty. Maryland Code Ann., Comm. Law § § 2-316, 2-719; McCarthy v. E. J. Korvette, Inc., 28 Md. App. 421, 347 A.2d 253 (1975).

10. Because of Radiation's substantial breach of the Agreement be reason of its failure to make payments when due, Neutron had the right to suspend

its performance and withhold delivery of the other Cobalt-60. Shapiro Engineering Corp. v. Francis O. Dayle, Inc., 215 Md. 373, 137 A.2d 695 (1958); Maryland Code Ann. Comm. Law §§ 2-703, 2-705 (1975).

11. This Court has the power to assess sanctions, including payment of costs and attorney's fees, against parties who file or maintain substantial justification and/or against officers of parties who file false affidavits with the Court. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980§0; F. D. Rich Co. v. United States ex rel Industrial Lumber Co., 417 U.S. 126 (1974); Dogherra v. Safeway Stores, Inc., 679 F.2d 1293 (9th Cir. 1982); Nemeroff v. Abelson, 94 F.R.D. 136 (S.D. N.Y. 1982); aff'd, 704 F.2d 652 (2nd Cir. 1983); Glassman Construction Co. v. Maryland City Plaza, Inc., 371 F. Supp. 1154 (D. Md. 1974).

DATED: October____, 1984

WILLIAM P. GRAY
United States District Judge
(signed on original)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RADIATION TECHNOLOGY, INC,.	
Plaintiff,	Civil Action No.HAR-82-2245
v.	(Assigned to Visiting Judge William P. Gray
NEUTRON PRODUCTS	Central District of California)
Defendant.	

ORDER

Defendant Neutron Products, Inc.'s motion for summary judgment and to recover costs, expenses and attorneys' fees having come on for hearing, the Court having heard the arguments of the parties and counsel, and for good cause shown as set forth in the Finding of Fact and Conclusions of Law filed this date,

IT IS HEREBY ORDERED THAT:

1. The defendant's motion for summary judgment is granted and the plaintiff will take

nothing by its action.

2. Plaintiff Radiation Technology, Inc. shall pay to defendant Neutron the sum of Twenty-Six thousand Five Hundred Dollars ($26,500.00) as compensation for expenses and attorneys' fees expended in preparing to oppose Radiation's motion for preliminary injunction.

3. The plaintiff has expressed a desire, under Federal Rule of Civil Procedure 54(b), to move that the Court declare the foregoing to be a final judgment. The defendant has expressed an intention to oppose such motion. This Court respectfully refers this matter to Judge Hargrove, in order that he might consider the contentions of the parties and use his own discretion in determining whether to give the plaintiff an appealable order or defer the matter until the case is otherwise finally adjudicated. In order to enhance Judge Hargrove's opportunity to exercise

full discretion in this matter, the award of $26,500.00 to the defendant is stayed pending further order of Court.

DATED: October_____, 1984.

WILLIAM P. GRAY
United States District Judge
(Signed on original)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-2348

Radiation Technology, Inc.

Appellant,

versus

Neutron Products, Inc.,
Jack Ranslhoff,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. John R. Hargrove; William P. Gray, District Judges. (CA R-82-2245)

Argued: June 4, 1985 Decided: August 26, 1985

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and GORDON, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Joseph H. Sharlitt (Patrick M. Pilachowski on brief) for Appellant; Leslie A. Nicholson, Jr., P.C. (Philip J. Harvey; Shaw, Pittman, Potts & Trowbridge on brief) for Appellee.

PER CURIAM:

Radiation Technology, Inc. (Radiation) sued Neutron Products, Inc. (Neutron) for alleged breach fo a written contract to deliver steel tubes containing a radioactive material called cobalt-60. Radiation sought both damages and extensive interim and permanent injunctive relief.

The district court granted Neutron's motion for summary judgment, and it slao awarded Neutron $26,500 in attorney's fees based on its finding that Radiation's motion for a preliminary injunction had been made in bad faith.

In Radiation's appeal, we affirm.

I.

The merits of the disputes involved three issues: (1) whether Neutron delivered the proper

quantity of cobalt-60, having obligated itself to deliver the same quantity of cobalt-60 that it had contracted to purchase from the Department of Energy, less an allowance for decay during processing; (2) whether Neutron breached its warranty because the encapsulating steel tubes contained microcracks; and (3) whether Neutron breached the contract by failing to use its best efforts in processing and delivering the product according to the time schedule set forth in the contract.

From our review of the record and consideration of the arguments, both written and oral, we conclude that Neutron did deliver a sufficient quantity of cobalt-60, that it did not breach its warranty and that it did exert its best efforts to process and deliver the product within the times fixed by the contract. As to these three issues, we preceive no issue of material fact and we agree with the district court that Neutron was

entitled to judgment as a matter of law.

II.

Before the trial on the merits, Radiation sought and pressed a motion for a preliminary injunction. In detailed findings the district court demonstrated that the verified complaint and affidavits supporting the motion "were made without any factual support, and either in actual bad faith or with such a reckless disregard of the truth as to constitute bad faith." These findings are not clearly erroneous, and they support the conclusion that we have quoted. The district court therefore did not abuse its discretion in making the award.

e see no merit in the several arguments that there were procedural irregularities in the adjudiction of Neutron's motion for an award of attorney's fees.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 84-2348

Radiation Technology, Inc.,

Appellant,

versus

Neutron Products, Inc., et al.,

Appeal from the United States District Court for the District of Maryland, at Baltimore. John R. Hargrove and William P. Gray, District Judges.

Upon considerstion of appellant's petition for rehearing, appellant's motion for leave to file the petition out of time, appellant's motion for stay of issuance of mandate pending filing of application for writ of certiorari, appellee's opposition to the motion for leave to file petition for rehearing out of time, and appellee's response in opposition to the motion for stay of mandate,

IT IS ORDERED that appelant's motion to file petition for rehearing out of time is granted and the petition for rehearing is denied.

IT IS FURTHER ORDERED that the motion for stay of mandate is denied.

Entered at the direction of Chief Judge Winter with the concurrence of Judge Sprouse and Judge Gordon, United States District Judge, sitting by designation.

For the Court,

_____

CLERK

Dated October 2, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

E-1

RADIATION TECHNOLOGY, INC., PLAINTIFF, V. NEUTRON PRODUCTS, INC., et al., DEFENDANTS.	C.A. No. R-82-2245

AFFIDAVIT OF DR. MARTIN WELT

My name is Dr. Martin Welt. I am President of the Plaintiff in this case, Radiation Technology, Inc.

1. I have read all of the exhibits filed along with the Plaintiff's Supplement to Motion for Perliminary Injunction. All of the correspondence is taken from the files of the Plaintiff.

2. The documents present an accurate record of the position taken by the State of Arkansas with regard to the cracks in the sources containing Cobalt-60 which was delivered to Radiation Technoloby's subsidiary in West Memphis,

Arkansas, in April of 1982. As of April 1 of that year, delays in shipments of Cobalt-60 by Neutron Products had placed Radiation Technology in an acute crisis in which performance of its contracts to a specific customer was imperiled.

3. Neurton Products has never, either before April, 1982 or thereafter, disclaimed its responsibility to have its sources (in which the Cobalt-60 was to be delivered to Arkansas) approved by the NRC and the authoritites of Arkansas.

4. As of the beginning of April, 1982, the State of Arkansas had not approved importation of Neurton Products' sources (containing the Cobalt-60) into Arkansas. Faced with the problems caused by Neurton Products' delay, I secured an oral understanding from Jackson Ransohoff, President of Neutron Products, that Neutron Products would reencapsulate the sources to be delivered into Arkansas, within one year of delivery, at no cost of Radiation Technology.

5. In reliance on this undertaking, I wrote the State of Arkansas the letter of April 2, which became part of the license given us by that state. That license requires the reencapsuling f the sources within one year.

6. The undertaking given me by Mr. Ransohoff is confirmed by his letter of April 23, 1982, to me, which is Exhibit J to the Supplement. It was also orally reaffirmed to me on a number of occasions. Notwithstanding, to this date, Neutron Products has never performed the reencapsulation.

7. There is no way that these sources can be reencapsulated within the time limit set by Arkansas (terminating at some time in April of 1983) unless it is done by Neutron Products, itself. These are their sources; they are familiar with their technical details. Neutron Products is capable of performing the reencapsulation it

it undertook to perform within the time limits imposed by Arkansas.

Dr. Martin Welt
(signed on original)

Signed and Sworn to before me on this 10th day of January, 1983.

Notary Public of New Jersey

(signed on original)

My Commission Expires : June 10, 1986

December 23, 1982

Richard E. Galen, Esquire
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Dear Rich:

This is to confirm the date for argument before Judge Ramsey on our Motion for Preliminary Injunction (limited to the reencapsulation of the pencils in Arkansas) for 10:00 a.m. on Friday, January 21, 1983.

Enclosed is our notice of deposition of Ransohoff for 10:00 a.m. on Monday, January 10, 1983. It is understood that you may have a conflict on that date and will inform me if that conflict materializes so that we can set another date.

Sincerely,

Joseph H. Sharlitt

cc: George Beall, Esquire
Patrick M. Pilachowski, Esquire

VIA BY HAND

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF MARYLAND

RADIATION TECHNOLOGY, INC.,

Plaintiff,

v. Civil Action J-82-2245

NEUTRON PRODUCTS, INC., et al.,

Defendants.

AFFIDAVIT OF DR. MARTIN WELT

State of New Jersey)

ss:

County of)

My name is Dr. Martin Welt. I am President of Radiation Technology, Inc., Plaintiff in this action. This affidavit is uttered in response to the affidavit dated September 8, 1982 of Jackson A. Ransohoff, President of Neutron Products, Inc., a Defendant in this action (the "Ransohoff Affidavit"). Mr. Ransohoff is also a

Defendant in this action. The facts set forth in this affidavit are true according to my own knowledge except in those circumstances where I indicate that they are uttered on information and belief, in which case I believe them to be true.

I:

(a) Mr. Ransohoff states in his affidavit:

> "While there have been bried periods of perceived shortage during the past 15 years, Cobalt-60 has been in generous oversupply for most of that period; and there is not presently a shortage of Cobalt-60 available for purchase by financially qualified, licensed users." (Ransohoff affidavit, p.3).

(b) As the documents filed by the Defendants themselves demonstrate, this generality certainly was not true at crucial points in time immediately preceding and during the negotiation of the transaction between the Plaintiff and Defendant Neutron Products, Inc. (NP). I refer to paragraph 2 of the identical letters of December 9, 1980 from K.M. Haythorn, Director, Energy Programs and Support Division, Department of Energy ("DOE"), to Marvin M.

Turkanis, Vice President of NP, and to me which are attached as Exhibit A to the Ransohoff Affidavit. I refer also to paragraph 3 of Mr. Haythorn's letter of February 25, 1981 to Mr. Turkanis, attached as Exhibit B to the Ransohoff affidavit.

It is clear from the statements made by this DOE official in those documents that on those dates there existed a:

> "lack of either an adequate supply of privately-produced Cobalt-60 or private production capability (to) meet the overall near-term needs of the private sector."

Accordingly, DOE made available the Cobalt-60 involved in this dispute.

(c) The contention is made in the Ransohoff affidavit (at page 3) that not only is there presently an abundant supply of Cobalt-60 to meet commercial demands, but that Atomic Energy of Canada, Ltd. ("AECL") holds:

> "an inventory of Cobalt-60 sufficient to satisfy current worldwide demand."

The implication is thus made that Plaintiff could replace the Cobalt-60 (denied it by the breaches

of Defendant NP) with Cobalt-60 purchased from AECL. That is not true for two reasons:

(i) The Cobalt-60 which was to be received by Plaintiff from Defendant NP was to be used in our new installations in North Carolina and Rhode Island scheduled to be operational shortly (see below). Of the shortfall in deliveries from Defendant NP. approximately 250,000 curies were to be utilized in each new facility. The North Carolina facility requires these curies for its commercial use by early December of this year. If that facility does not receive the needed curies by that time, it will be totally idled, at a total loss to our company, until adequate Cobalt-60 reaches it. The Rhode Island facility requirements commence soon thereafter, in early 1983.

When the continued breach of Defendant NP became clear to our company, we contacted AECL as an alternative source. We were informed by AECL that no Cobalt-60 would be available for

shipment to our company until at least February 1, 1983 at the earliest. Acordingly, the unavailability of Cobalt-60 from AECL at the time our company requires it eliminates AECL as a substitute source for 250,000 curies of Cobalt-60 for our North Carolina facility. It is not even clear whether the Canadian Cobalt-60 could be available at a time when our Rhode Island facility will require it.

(ii) The Cobalt-60 produced by AECL in its physical configurations is both norrower and shorter than that produced by Defendant NP. It is impossible to interchange the AECL sources with the NP sources in a given module. Although the AECL sources could be used in a separate and distinct module form the special module made by RT for the NP sources, to do so would greatly limit the versatility to planned source loading configuration. Therefore, we do not consider AECL sources to be an acceptable alternative for the anticipated specially designed NP sources.

Further commercial use of such substituted modules (which must be designed and built for the substituted Cobalt-60 before it can be used) is commercially limited, especially in comparison to the commerical uses of the Cobalt-60 for which we contracted. Our company could not obtain the commercial benefit for which it had bargained in its contract with NP if forced to purchase AECL Cobalt-60 (assuming it even were available). AECL Cobalt-60 is not an adequate, acceptable or commercially comparable substitute for the NP Cobalt-60.

II:

The numbers submitted by Defendant NP to excuse the breach are unintelligible. The facts are not.

he obligation of Defendant NP to supply curies of Cobalt-60 to our company is set out in the Agr-ement between us executed September 11, 1981, effective August 28, 1981 (Attahced to the Complaint in this case as Exhibit A, hereinafter the "Agreement").

Under that Agreement, which was drafted by Mr. Ransohoff, a target amount of 1,300,000 curies was to be delivered by Defendant NP to our company. (See the preamble to that Agreement, and paragraph 8 thereof). The Agreement provided that the precise number of curies to be delivered turned on the precise number made available to Defendant NP by DOE in the latter's offer of sale of February 25, 1981 (see paragraph 8 of this Agreement). The parties to the Agreement targeted that amount to be the same figure (1,300,000) as of January 31, 1982.

The unabridged contract orders between Defendant NP and DOE are attached to this response as Exhibit 1. They reveal that DOE was offering 1,529,540 curies of Cobalt-60, computed as of November 1, 1980. Since the attrition figure of Cobalt-60 is approximatley 1.025% per month (not 1.1% as stated by Mr. Ransohoff, the original Cobalt-60 diminished to 1,323,052 curies as of January 31, 1982. If 3% for "decay in processing" is deducted, the resulting figure is 1,283,361.

That figure is 194,461 curies more than what was delivered by NP to our company.

The fig[illegible] 1,283,361 is derived from the 1,529,540 curies available under the original DOE offer, the only figure originally known to our company in this transaction. That figure was used in the Complaint because the attrition actually incurred by the Cobalt-60 was a matter between Defendant NP and its vendor, DOE.

It is important to note that all of the Cobalt-60 held by DOE (and offered to the public in its February 25, 1981 offer) was available for delivery to Defendant NP as early as August 28, 1981, when the Agreement between it and our company went into effect. Computed from the original amount of 1,529,540 curies, on August 28, 1981, Defendant NP could have taken delivery of 1,335,013 curies (after also deducting the 3% loss for "decay during processing"). Since our company's Agreement with the Defendant NP called for its purchase of this Cobalt-60 (for resale to us), delivery of that amount to Defendant NP would have permitted it to

deliver to us -- by December 15, 1981 -- the 1,000,000 curies that it was required (by paragraph 3 of the Agreement) to exercise its "best efforts" to deliver to us. Defendant NP has stated absolutely no reason why it failed to mee. these deliveries prior to December 15, 1981 -- wt.:n our company had plans for the use of this Cobalt-60.

III:

In paragraphs 11 and 12 of the Ransohoff affidavit, he first admits that five sources of Cobalt-60 were out of specification when shipped to our company, but then contends that we waived these defects. Nothing of the sort occurred.

The shipment in which the out-of-specification Coablt-60 was contained was received at our subsidiary's plant in West Memphis, Arkansas during February, 1981, long after the Cobalt-60 was expected and required for urgent use by a customer. It was received in a larger shipment which was then processed immediately by employees working all thorugh a weekend for use by the customer, to whom

delivery had been delayed. It was only after the shipment was processed in West Memphis that the fact that the sources were out-of-specification became known to persons in our company who had knowledge of the specifications of the Agreement. It was then too late for our employees to reject and return this Cobalt-60.

Shortly thereafter, however, our company notified Defendant NP of the receipt of the out-of-specification, nonconforming Cobalt-60, by letter and of our non-acceptance of it.

IV:

In paragraph 7 of the complaint, the refusal of the State of Arkansas to accept the present containment of the sources was alleged. It was averred to by me. It has not been denied by Mr. Ransohoff.

In paragraphs 13, 14 and 15 of his affidavit, Mr. Ransohoff again admits the existence of the defects in the sources, but argues that the State of Arkansas is wrong in its view that a safety threat exists which requires reencapsulation

The true facts are that following examination of the defective sources by a consultant hired by our company, Steven Fishman, Ph.D., it was clear that the defective sources raised a problem under the Warranty given by Defendant NP. Defendant NP then consulted officials of the Nuclear Regulatory Commission, and it was the recommendation of one such official, made in Defendant NP's office, that the requirement be imposed on Defendant NP to reencapsule the defective sources within one year. That NRC recommendation was then accepted by the State of Arkansas.

It is now the end of September, 1982. Unless these sources are reencapsulated by the end of April of 1983, all of them must be withdrawn from Arkansas Nothing in Defendant NP's papers refutes this fact which our company must face and deal with in consequence of Defendant NP's breach of Warranty.

Dr. Martin Welt

Sworn to before me and subscribed in my presence this 22nd day of October, 1982.

Notary Public

My commission Expires: Frank A. Gaudioso, April 19,

(signed on original)

January 18, 1983

HAND DELIVERED

The Honorable Norman P. Ramsey
United States District Judge
United States District Court
for the District of Maryland
Room 120
101 W. Lombard Street
Baltimore, MD 21201

Re: Radiation Technology, Inc. v.
Neutron Products, Inc.
Civil Action No. R-82-2245

Dear Judge Ramsey:

This is to confirm the request that the undersigned transmitted orally to Ms. Thresher of your chambers this noon: that Plaintiff's Motion for Preliminary Injunction (seeking the Court's order directing the Defendant to re-encapsule the sources located in West Memphis, Arkansas containing the Cobalt-60 involved in this case) be taken off the Court's calendar. It is now scheduled for argument at 9:30 a.m. on this Friday, January 21.

This was done because the Plaintiff in this case has taken the initiative with the State of Arkansas, seeking a determination from it that the sources do not require re-encapsulation. To this date, Arkansas has required this re-encapsulation.

The issue that was scheduled before the Court for argument this Friday was whether Plaintiff is entitled to an order directing Defendant to do the re-encapsulation under the contract between the parties and under Arkansas license to the Plaintiff. If Arkansas now determines that no re-encapsulation is required by it, that issue is mooted. The Court need not take its time to intervene in this phase of the case.

Arkansas has not yet made such a redetermination. Since there is a distinct possibility that it will, we are presently taking Plaintiff's Motion off the calendar. If Arkansas does not so determine, the Motion will be renewed.

We understand that Mr. Sharlitt's office has just been served with Defendant's papers in opposition to this Motion. Mr. Sharlitt did not read those papers before making his call to Ms. Thresher. That call was made in order not to take the Court's time in this matter unless it was necessary to do so. It may well not be necessary -- ever -- to do so.

This matter was discussed by Mr. Sharlitt with Richard Galen, Esq., counsel for the Defendant in this matter, last evening. Mr. Galen was to relay the Defendant's position in this matter to Mr. Sharlitt. Mr. Galen is in trial today. Mr. Hanlon of Mr. Galen's firm just called Mr. Sharlitt to inform him that Defendant prefers to go forward with the argument on the 21st. The Motion is, however, Plaintiff's; it is being taken off the calendar for the reasons stated above, which the Plaintiff submits are appropriate.

Very truly yours,

SHAWE & ROSENTHAL

Patrick M. Pilachowski

FREEDMAN, LEVY, KROLL & SIMONDS

Joseph H. Sharlitt

(signed on original)

PPJS/dmz

cc: George Deall, Esq.
Richard E. Galen, Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RADIATION TECHNOLOGY, INC.,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. HAR-82-2245
v.	)	(Judge Hargrove)
	)	
NEUTRON PRODUCTS, INC.,	)	
	)	
Defendant.	)	
	)	

MOTION OF DEFENDANT
NEUTRON PRODUCTS, INC.
TO RECOVER COSTS, EXPENSES
AND ATTORNEYS" FEES

Defendant NEUTRON PRODUCTS, INC. ("NEUTRON") moves this Court, pursuant to Rule 11, Fed. R. Civ. P., Rule 604 (b), Maryland Rules of Procedure, and its inherent equitable powers for the entry of an order awarding NEUTRON the costs, expenses and attorneys' fees incurred in opposing the Motion for Preliminary Injunction filed by plaintiff RADIATION TECHNOLOGY, INC. ("RADIATION") in this action, a total of Seventy-Nine Thousand One Hundred Eleven Dollars and Twenty Four Cents ($79,11.24), and

ordering RADIATION, its president, Martin A. Welt, and its attorney, Joseph H. Sharlitt, Esq., to pay NEUTRON the amount of such award.

As grounds for this motion, NEUTRON states that the Motion for Preliminary Injunction was filed and maintained by RADIATION in bad faith and without substantial justification and was founded upon the knowingly false allegations of Martin A. Welt submitted under oath. Additionally, the motion for preliminary injunction was filed and maintained by RADIATION's counsel in violation of the certification requirements of Rule 11. NEUTRON has incurred substantial costs and expenses, including attorneys' fees and the costs of management time, in opposing this Motion for Preliminary Injunction which RADIATION never brought on for a hearing and has now completely abandoned.

This motion is based upon the attached

Memorandum of Points and Authorities in support thereof and attached Exhibits and affidavits of Philip J. Harvey and Jackson A. Ransohoff, together with all other pleadings and papers on file in this action.

NEUTRON respectfully requests that oral argument be held on this motion.

Dated: April 25, 1984

SHAW, PITTMAN, POTTS
& TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

By: _____
Leslie A. Nicholson, Jr., P.C.
Philip J. Harvey

and
MILES & STOCKBRIDGE
10 Light Street
Baltimore, Maryland 21201
(301) 727-6464

By: _____
George Beall

Attorneys for Defendant
NEUTRON PRODUCTS, INC.

(signed on original)

May 9, 1984

Honorable James R. Hargrove
United States District Judge
United States District Court
for the District of Maryland
101 West Lombard Street
Baltimore, Maryland 21201

Re: Radiation Technology, Inc. v.
Neutron Products, Inc.
Civil Action No. R-82-2245

Dear Judge Hargrove:

Enclosed is a courtesy copy of a motion recently filed by Neutron Products to recover its costs, expenses and attorneys' fees. As you probably know, this case is set for argument before you on May 30, 1984, to consider Neutron Products' Motion for Summary Judgment. The purpose of this letter is to request that the enclosed motion also be scheduled for argument on May 30, and if your schedule permits, we would also like to take up our pending Motions To Compel, dated June 10 and June 27 1983.

Although I have orally advised opposing counsel of our intention to ask that these three additional motions be heard on May 30, I am also sending a copy of this letter to him so he will have a written record of our request.

Sincerely yours,

Leslie A. Nicholson, Jr.

Enclosure

cc: Joseph H. Sharlitt, Esquire
George Beall, Esquire
bcc: Mr. Jackson A. Ransohoff

(signed on original)

May 16, 1984

The Honorable John R. Hargrove
United States District Court
101 West Lombard Street
Baltimore, Maryland 21201

Re: Radiation Technology, Inc.
v. Neutron Products, Inc.
Civil Action No. HAR-82-2245

Dear Judge Hargrove:

This letter is in response to the letter of Leslie A. Nicholson, Jr., Esq., counsel for the Defendant, to the Court, dated May 9. In that letter Mr. Nicholson requests that the Motion filed by the Defendant regarding recovery of costs, etc., be heard on May 30, 1984, at which time Defendant's Motion for Summary Judgment will be heard.

Although Plaintiff views that the latest of Defendant's motions is a repetition of its Motion for Summary Judgment, there are elements in it that are separate and apart from the Court's consideration of the summary judgment motion. In its latest motion, Defendant has chosen to make ad hominem allegations against Plaintiff and counsel. Plaintiff will show that these accusations are not only groundless, but that they are being used as makeweight to support Defendant's position on summary judgment. Nonetheless, they require separate, careful response, as the Court will recognize. In the absence from the city of Plaintiff's counsel, Defendant has granted through May 19 for filing of an opposition to this latest

motion. Every effort will be made to comply with that date.

But Plaintiff requests that the hearing on May 30 be restricted to the issue originally set by the Court for argument on that date: to wit, the motion for summary judgment.

Sincerely,

Joseph H. Sharlitt

JHS:b
cc: Philip J. Harvey, Esq.

(signed on original)

Supreme Court, U.S.
FILED
FEB 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RADIATION TECHNOLOGY, INC.,
Petitioner,

v.

NEUTRON PRODUCTS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

LESLIE A. NICHOLSON, JR.
Counsel of Record
PHILIP J. HARVEY
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000
Attorneys for Respondent Neutron Products, Inc.

February 1, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Did the United States District Court for the District of Maryland abuse its discretion or violate the petitioner's constitutional right to due process in connection with the imposition of sanctions based on findings that the petitioner had engaged in bad faith conduct before the court? *

Did the petitioner properly raise its procedural and due process arguments before the district court?

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* Pursuant to Supreme Court Rule 28.1, Neutron states that it has no parent companies, subsidiaries or affiliates.

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IN THE

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Respondent.

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---

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

Petitioner Radiation Technology, Inc. ("Radiation") and respondent Neutron Products, Inc. ("Neutron") are corporations involved in the commercial processing and use of cobalt-60, a radioactive isotope with a variety of applications in medicine and industry. The number of suppliers of cobalt-60 to corporations engaged in this business is limited; the United States Department of Energy ("DOE") is a major source. The dispute underlying this case arises out of an offer by DOE to sell three hundred eight "targets" containing cobalt-60, which had been produced as an intended by-product of the operation of DOE's nuclear reactors at its Savannah River labora-

tory. In order to be used in commercial irradiators of the type operated by Radiation and Neutron, the cobalt-60 in these targets has to be disassembled and then double encapsulated in stainless steel tubes to produce "sources." Neutron processes cobalt-60 and encapsulates it into sources for its own use and for sale to other licensed users, such as Radiation.

The DOE offer of these three hundred eight targets stated that the number of curies contained in them was calculated (without guarantee) to be 1,519,270 as of November 1, 1980.[1] Radiation and Neutron were the only bidders for these targets. In connection with the bid process, a dispute arose before the General Accounting Office concerning the award of the contract for their sale. This dispute was settled when Neutron and Radiation entered into a written Agreement, dated September 11, 1982, out of which this case ultimately arose.

Under the relevant terms of the Agreement, Neutron agreed to purchase the specified three hundred eight targets from DOE, and to manufacture and sell to Radiation double encapsulated cobalt-60 sources containing the same number of curies (± 10,000) received by Neutron from DOE, less an allowance of 3% for decay during processing. Radiation agreed to pay $0.55 for each curie in the double encapsulated sources actually delivered by Neutron to Radiation.

Each source delivered to Radiation was to contain between twelve thousand and twenty thousand curies. In the Agreement, Neutron warranted the integrity[2] of the sources for one year from the date of delivery. The Agreement also provided that, at no extra charge, in the course of one of Neutron's deliveries to Radiation's sub-

---

[1] A "curie" is a measure of the degree of radioactivity of a radioisotope such as cobalt-60.

[2] A source containing cobalt-60 has "integrity" if it does not leak radioactivity.

sidiary located in Arkansas, Neutron would ship up to two hundred thousand curies of Radiation's previously owned sources free of charge from Arkansas to New Jersey, where Radiation's major facility is located.

After the Agreement was signed, Neutron undertook to perform. During its performance, it encountered a series of difficulties which had the effect of delaying its deliveries of sources to Radiation. The primary factor causing delay was the discovery by Neutron, just before shipments were to commence, of "micro-cracks" in the welds of the sources, which were visible under a 50X power microscope. After these micro-cracks were discovered, shipments were suspended pending the completion of an intensive investigation into their cause and into their effect, if any, on the integrity of the sources. Neutron had the sources analyzed by an independent engineering consulting firm, which concluded that the micro-cracks were inherent in the kind of stainless steel used to make the sources and that the micro-cracks would not propagate more than half way through the sources for two thousand years. With this assurance, all sources manufactured by Neutron, containing 1,088,900 curies, were delivered to Radiation by April 16, 1982.

On August 4, 1982, Radiation filed a complaint, verified by its president, Martin Welt, Ph.D., in the United States District Court of the District of Maryland. In that complaint, Radiation alleged under oath that Neutron breached the Agreement by (1) delivering 430,370 fewer curies than agreed; (2) delivering six sources, supposed to contain 72,000 curies, which did not meet the specifications in the contract and were therefore allegedly worthless; (3) violating the terms of the warranty by delivering sources made defective by the existence of the micro-cracks; (4) not delivering the cobalt-60 in accordance with the schedule in the Agreement; and (5) not delivering the other cobalt-60 sources from Radiation's Arkansas facility to its New Jersey facility

in a timely fashion. Radiation further alleged under oath that, because cobalt-60 was a rare commodity, unobtainable elsewhere, and because the purportedly defective sources were dangerous, it was entitled to preliminary and permanent injunctive relief. In addition to money damages, therefore, Radiation sought a mandatory injunction requiring Neutron to deliver, free of charge, an additional 502,370 curies (to replace those 72,000 curies which were allegedly worthless and to replace the alleged 430,370 curie shortfall) and requiring Neutron to re-encapsulate, again free of charge, all of the purportedly defective sources because of the radiological danger they allegedly posed to workers at the plant where they were used in Arkansas and to the people of that State.

Radiation filed a motion for preliminary injunction on August 18, 1982. It was initially based on the allegations of the complaint, verified by Dr. Welt, and subsequently supported by additional affidavits from Dr. Welt. This motion sought the injunctive relief requested in the verified complaint. Radiation delayed scheduling a hearing on its motion until January 21, 1983, five months after the complaint had been filed. The hearing was to be held before District Judge Norman P. Ramsey, to whom the case had been assigned.

If granted, the preliminary injunction motion would have cost Neutron hundreds of thousands of dollars. Neutron and its counsel therefore prepared extensive opposition memoranda and obtained affidavits from the individuals involved in the case, including officials of the Nuclear Regulatory Commission and the Arkansas Department of Health, consultants hired by Neutron, consultants allegedly hired by Radiation, and Neutron's president, Jackson A. Ransohoff, all at substantial expense. On January 18, 1983, the very day that Neutron hand-delivered its final set of opposition papers to counsel for Radiation, including the affidavits which revealed

that Dr. Welt had repeatedly made false and misleading statements under oath, Radiation abruptly withdrew its motion. In a letter to the district court, counsel for Radiation curiously volunteered that he had not read Neutron's papers before Radiation decided to abandon its motion.

Thus, despite Radiation's claims in its complaint, motion and supporting affidavits that the cobalt-60 which Neutron had delivered was encapsulated in sources which the State of Arkansas had determined to be defective and to represent an imminent radioactive "threat" to the "safety of individuals working in proximity to these faulty sources and a threat to the safety of the public," Radiation chose not to bring its motion on for a hearing before Judge Ramsey in January 1983. In fact, the motion was never renewed.

When Radiation's motion was withdrawn in January 1983, the action was approximately five months old, but no formal discovery had yet been taken. During the course of the next year, the parties undertook comprehensive discovery of each other. Among other things, Neutron deposed Dr. Welt concerning the claims he made in the verified complaint and the various affidavits he filed in court in connection with the abandoned preliminary injunction motion. Neutron also deposed the manager of Radiation's plant in Arkansas where the sources were delivered. During this period of discovery, it became clear to Neutron that the factual allegations made in Radiation's complaint and motion for preliminary injunction were not only false, but were known by Radiation, its president and its employees to be false at the time they were originally asserted.

In February 1984, Neutron filed a motion for summary judgment, seeking dismissal with prejudice of Radiation's complaint. Radiation filed a written opposition to that motion. In a letter dated April 18, 1984, the district judge to whom the case had been reassigned, Judge John

Hargrove, set the motion for hearing on May 30, 1984. Petitioner's Appendix ("Pet. App.") at J-1.

Thereafter, on May 4, 1984, Neutron filed a motion to recover costs and attorneys' fees because Radiation's claims which were made in support of its abandoned motion for preliminary injunction had been made in bad faith and in reckless disregard of the facts. Neutron sought to recover, *inter alia*, the substantial costs and attorneys' fees which it had expended in preparing to oppose Radiation's motion before it was withdrawn. In a letter from its counsel to the district court dated May 9, 1984, Neutron asked that this motion also be heard during the hearing previously scheduled for May 30, 1984. Pet. App. at K-1 through K-2.

In response to that motion, Radiation filed a twenty-four page written opposition on May 23, 1984. In a letter from its counsel to the court, however, it asked that the motion to recover costs and attorney's fees not be heard on May 30, 1984, for the sole reason that its counsel believed that the motion "require[d] separate, careful response. . . ." Pet. App. at L-1 through L-2. Counsel for Radiation did not indicate in that letter that Radiation demanded an evidentiary hearing on the motion, nor that it wanted to subpoena witnesses to testify in connection with the disposition of the motion, nor that its witnesses were unavailable on that day. Furthermore, at no time before the hearing did Radiation file a motion seeking to postpone it.

The hearing on both these motions was held on May 30, 1984, before the district court. Senior District Judge William P. Gray from the Central District of California, sitting by designation, heard the arguments of counsel on the record that day from approximately 9:35 a.m. until a recess before lunch, at which time he indicated that he wanted to be able to read the rest of record before he continued. Judge Gray specifically warned

counsel for Radiation that, if the claims made by Neutron in its motion were correct concerning Radiation's misrepresentations in its affidavits related to the safety of the cobalt sources because of the micro-cracks, "I am going to award attorneys' fees to the defendant on this." The court further indicated before the recess that "depending on how I rule on the issue of the warranty [the "micro-crack issue"], attorneys' fees will be awarded and I have to resolve a matter of the failure of the plaintiff to pursue its preliminary injunction. . . ."

The hearing resumed at aproximately 4:30 p.m., after the court had read the record fully. At no point during the hearing did Radiation's counsel ask that the ruling on this motion be postponed, nor did he ever seek the opportunity to have witnesses testify, to file further papers, or to engage in further discovery. Despite all of Radiation's arguments in its petition, it never raised any of these procedural claims before the district court.

At the end of the hearing, the district court concluded that there were no genuine issues of material fact and that Neutron was entitled to judgment as a matter of law on all five claims made by Radiation in its complaint. Three of those five claims also contained the allegations which formed the basis for Radiation's abandoned motion for preliminary injunction. In addition to finding that these three claims presented no genuinely disputed issues of material fact, the district court concluded that these claims were completely groundless and had been asserted either in bad faith or with such reckless disregard for the facts as to constitute bad faith. After a complete examination of the record before it and after counsel for Radiation was afforded the opportunity to be heard on the record, the district court granted Neutron's motion to recover costs and fees and awarded Neutron the sum of $26,500.00 in compensation

for the legal fees and expenses expended in opposing the motion for preliminary injunction. Thereafter, the district court entered detailed findings of fact concerning the motion to recover costs and fees and also conclusions of law pertaining to both motions.

These rulings were certified to the court of appeals pursuant to FED. R. CIV. P. 54(b). In a per curiam opinion dated August 26, 1985, the court of appeals affirmed the district court, rejecting all of Radiation's arguments.

REASONS FOR DENYING THE WRIT

This Court should deny the writ because it fails to present an important question of federal law which has not been previously considered and determined by this Court. The actions of the district court in its consideration of the motion to recover costs and attorneys' fees and the ruling thereon were fully consistent with the decision of this Court in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

Radiation ignores this decision, and instead cites *In the Matter of Los Angeles County Pioneer Society*, 217 F.2d 190 (9th Cir. 1954), in an attempt to demonstrate that there is now a conflict between two courts of appeals concerning the procedures to be followed in connection with the imposition of sanctions. In fact, however, *In the Matter of Los Angeles County Pioneer Society* is so factually distinguishable as to be completely inapposite. There is thus no conflict between courts of appeals which needs to be resolved.

This Court should also deny the writ because the due process arguments now raised by Radiation were not raised in the district court.

I. THE DISTRICT COURT AFFORDED THE PETITIONER DUE PROCESS BEFORE IMPOSING SANCTIONS

The procedural abuses in which modern day litigants all too frequently engage are by now well known and well documented. When these abuses surface in the context of filing groundless motions and in the bad faith and vexatious conduct of litigation, the courts are provided with tools to deter and punish such conduct. In 1982, when the preliminary injunction motion was filed, pursued and abandoned, FED. R. CIV. P. 11 provided district courts with specific authority to restrain and punish such abuses. To make FED. R. CIV. P. 11 more effective, it was amended in 1983. When Neutron's motion to recover attorneys' fees and costs was filed, this rule provided that, when a motion is filed in a district court and is signed by an attorney, his signature constitutes a certificate that the motion, *inter alia*, "is well grounded in fact. . . ." If a motion is signed in violation of that rule, the court is further directed that it "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the . . . motion, . . . including a reasonable attorney's fee."

Long before FED. R. CIV. P. 11 was adopted, however, federal courts had the inherent power to assess attorneys' fees when a party to litigation acted in bad faith, vexatiously, wantonly or for oppressive reasons. *See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259 (1975). As this Court has stated, " 'bad' faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall v. Cole*, 412 U.S. 1, 15 (1973).

In this case, the district court encountered just such abuses. Radiation filed a motion for preliminary injunc-

tion, premised on the central claim that Neutron had delivered over one million curies of radioactive cobalt-60 to Radiation's subsidiary in Arkansas in containers which were so defective that they represented a radiological hazard to the workers in the plant and to the people of Arkansas, and that the government of the State of Arkansas had made such a determination. Radiation also alleged under oath that Neutron had delivered 430,370 curies too few to it, in violation of the terms of the Agreement, and that six sources, containing 72,000 curies, were worthless. Based on these claims, set forth in a verified complaint and several affidavits from Dr. Welt, the president of Radiation, Radiation sought a mandatory injunction directing Neutron to re-encapsulate all of the cobalt-60 already delivered and to deliver an additional half million curies of cobalt-60, all free of charge.

In fact, however, these claims were factually groundless and, as was shown by discovery obtained in the case after the motion was withdrawn, were known to be false by Radiation when they were made. In its verified complaint, Radiation alleged that, because of the existence of the micro-cracks, the State of Arkansas had "determined that such cracks pose a radioactive threat unacceptable to it." Radiation's president, despite his verification of the complaint, however, subsequently admitted in his deposition that he had "no idea" whether the State of Arkansas ever made a determination that the cobalt-60 sources presented any radiological threat. In a letter he wrote four months *before* he verified the complaint, Dr. Welt informed the State of Arkansas that, despite the micro-cracks, the sources had a "life expectancy of 2000 years." Also, in January 1983, in a letter to the State of Arkansas the manager of Radiation's plant in Arkansas, where the sources had been delivered, stated that "these sources do not represent a Radiological Safety Hazard."

The other claims made by Radiation in its preliminary injunction motion were also shown to be false. Radiation sought in its motion complete replacement of six allegedly worthless sources of cobalt-60. The manager of the Arkansas plant and the president of Radiation both admitted in their depositions, however, that these sources were accepted and used, and were not worthless. In its preliminary injunction motion, Radiation also sought the delivery to it, free of charge, of the alleged 430,370 curie shortfall for which it claimed it had already paid. The plain language of the Agreement showed that Radiation was not entitled to receive 430,370 curies more than it did, however. The undisputed facts also demonstrated that Radiation had only paid for the sources it actually received.

The issue brought before the district court on May 30, 1984, was not one of credibility of affiants but rather was one of admitted misrepresentations made in sworn pleadings and affidavits filed with the court. The record before the district court made it unmistakably clear that Radiation had made a series of factual allegations before the court which were false, fraudulent and groundless. At the close of the hearing, it was evident to the district court that Radiation's motion for preliminary injunction had been brought, if not in bad faith, with such a reckless disregard of the facts as to constitute bad faith. Radiation's claim that the cobalt-60 sources were defective and posed an imminent, unacceptable radioactive threat to the safety of the workers and the public was, the district court stated, "enough to scare a district judge" but for which there was "no justification, no basis in the record. . . ." Radiation now argues to this Court that the imposition of sanctions against it was done without the benefit of due process. Against this record, controlling precedent from this Court demonstrates that Radiation's claims are unfounded.

It is axiomatic that provisions of federal law concerning the imposition of procedural sanctions must be ap-

plied in light of the Fifth Amendment guarantees of due process. *See, Societe Internationale v. Rogers*, 357 U.S. 197, 208-212 (1958). Contrary to Radiation's arguments, however, due process does not require a plenary trial before attorneys' fees can be imposed as a sanction. What is required, as this Court has stated, is simply "fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 767 (footnote omitted). This is precisely what Radiation received.

After Neutron filed a written motion and supporting memorandum, setting forth precisely the relief sought and the grounds therefore, Radiation filed a lengthy written memorandum in opposition to Neutron's motion to recover its attorneys' fees. Thereafter, a hearing was held before the district court, and Radiation's counsel appeared and argued.[3] The transcript of the hearing is eighty-five pages long. This Court's prior decisions require nothing more. The suggestion by Radiation that it was deprived of due process because Neutron's motion was not filed before the case was transferred from Judge Ramsey, the district judge assigned to the case when the preliminary injunction hearing was abandoned, is meritless. It is simply inaccurate to state, as Radiation does repeatedly in its petition, that only Judge Ramsey could hear this motion because he had already participated in the "preliminary injunction proceeding." As Radiation's petition makes clear, there was no such proceeding because Radiation withdrew its motion before a hearing was held. While it is improper to speculate concerning the familiarity which Judge Ramsey acquired with a motion in one case assigned to him which was never

[3] Radiation has claimed that it was given inadequate notice of this motion because Judge Hargrove's letter of April 18, 1984, to counsel setting the May 30, 1984, hearing fails to mention Neutron's motion to recover attorneys' fees. That letter could not possibly have mentioned Neutron's motion, because it was filed three weeks after the letter was written.

brought on for hearing, it certainly cannot be said that, once the case was assigned to a different judge, due process deprived Neutron of the right to file its motion. This is particularly true in light of the fact that it was during pretrial discovery, conducted after the motion was withdrawn, that Radiation's president and employee admitted that the sworn allegations made on behalf of Radiation were false. Additionally, Radiation's apparent claim that visiting senior judges such as Judge Gray cannot decide such motions is equally meritless and without colorable legal support. *See*, 28 U.S.C. § 296.

Radiation has further argued it was entitled to a complete evidentiary hearing, and that the entry by the district court of findings of fact is further proof that it should have held a trial, because such findings cannot be entered without one. This issue has been settled by this Court, as well. In *Roadway Express, Inc. v. Piper*, *supra*, the Court ruled that, before a district court can award sanctions based on its inherent powers, it needs to make specific findings on the issue of bad faith. 447 U.S. at 767. Nowhere did this Court even suggest that a trial had to be held before such a finding could be made, only that there be "fair notice and an opportunity for hearing on the record." *Id.* This is consistent with the procedure that has been followed in the courts of appeals. *See, e.g., Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516, 522-523 (9th Cir. 1983); *McLaughlin v. McPhail*, 707 F.2d 800, 806 n.10 (4th Cir. 1983).

To require a full trial before an award of sanctions can be made would undermine the efficacy of sanctions and effectively limit the ability of district courts to deal with litigation abuses. This need of trial courts to deal with sanction motions in an efficient but fair manner, and not to become ensnared in a trial within a trial, was emphasized by the Advisory Committee Note of 1983 to Amended FED. R. CIV. P. 11:

> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

97 F.R.D. at 200-201. There is no valid reason to undermine the purpose of sanctions by imposing a requirement that a complete trial be held before monetary sanctions of this kind can be imposed.

The only argument advanced by Radiation which it supports with case authority is its claim that the Ninth Circuit's opinion in *In the Matter of Los Angeles County Pioneer Society, supra*, conflicts with the Fourth Circuit's opinion in this case, creating a conflict between the circuits which this Court should resolve. The facts of *Pioneer Society* are not even remotely similar to this case. In *Pioneer Society*, an attorney representing a creditor in a bankruptcy case sought a temporary restraining order, restraining the Superior Court of the Los Angeles County from taking action in a case pending before it. At a hearing four days later before the district court in the bankruptcy proceeding, the court set aside the restraining order and then summarily disbarred the attorney who originally sought the order. The court of appeals described the end of the hearing as follows:

> The first intimation the appellant had that the District Court was considering anything other than the setting aside of the restraining order came at the end of the session. Then after a finding by the court that appellant committed a fraud on the court by procuring the restraining order, and the reading of an order of disbarment, *already prepared by the court*, the record concludes:
>
> > "The Court: Mr. Clerk, here is the order, and you will enter it forthwith, immediately.

"The Clerk: Yes, your Honor.
"Mr. Lavine: If your Honor please, ——
"The Court: The court will adjourn."

217 F.2d at 191-192 (emphasis in original).

The facts of this case could not be more different. Radiation knew Neutron had filed a motion seeking to recover attorneys' fees as a sanction and asked that it be heard on May 30, 1984, had itself filed an extensive written memorandum in opposition to that motion, had been reminded by the district court twice, mid-hearing, that if the record was as Neutron claimed, attorneys' fees would be imposed, and had the opportunity, through counsel, for its hearing on the record.

The claim that the district court only considered the sanctions motion in an instant at the end of the hearing is erroneous and misleading. The basis for Neutron's motion was that the factual allegations made in support of Radiation's preliminary injunction motion were groundless and made in bad faith. These same factual allegations formed the basis for Radiation's case in chief, as well. Thus, in connection with Neutron's motion for summary judgment, these same facts were argued at length. The overlapping nature of the motions was explicitly recognized in the letter from counsel for Radiation to the district court in which he stated, "Although *Plaintiff views that the latest of Defendant's motions is a repetition of its Motion for Summary Judgment*, there are elements in it that are separate and apart from the Court's consideration of the summary judgment motion." (Emphasis added). Even a cursory review of the record reveals that Radiation's counsel was afforded a full opportunity to address whatever issues he deemed important, and that discussions of the central claim in Neutron's sanctions motion, the radiological safety and microcrack issue, consumed the great bulk of the hearing. In short, Radiation had ample opportunity to show that there were facts supporting its preliminary injunction motion

and failed to do so. Radiation's argument that it was deprived of due process on the basis of this record is frivolous.

II. THE ISSUE OF DUE PROCESS WAS NOT RAISED BEFORE THE DISTRICT COURT

It is well settled that a litigant cannot argue before the court of appeals an issue not raised before the district court. *See, McGowan v. Gillenwater*, 429 F.2d 586 (4th Cir. 1970). It is equally well settled that this Court will not review issues which the petitioner failed to raise below. *See, Jones v. Hildebrant*, 432 U.S. 183 (1977). Neutron acknowledges that Radiation raised its due process issue before the court of appeals, but one can search the record before the district court in vain to find any reference to Radiation's procedural claims. In fact, Radiation never argued until its brief to the court of appeals that its procedural rights had been violated, nor did it at any time even intimate to the district court that it desired that a different procedure be followed. Having been given the opportunity to make this claim in the district court, and having failed to do so, Radiation should be barred from raising it before this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LESLIE A. NICHOLSON, JR.
Counsel of Record
PHILIP J. HARVEY
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000
Attorneys for Respondent Neutron Products, Inc.

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No. 85-1147

IN THE

SUPREME COURT FOR THE UNITED STATES

January Term, 1986

RADIATION TECHNOLOGY, INC.

Petitioners,

V.

NEUTRON PRODUCTS, INC.

Respondent

REPLY TO BRIEF OF RESPONDENT"S OPPOSITION TO CERTIORARI

JOSEPH H .SHARLITT
1750 Pennsylvania Avenue, N.W
Suite 322
Washington, D.C. 20006
(202) 393-4940

Counsel to Petitioner
Radiation Technology, Inc.

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REPLY TO BRIEF OF RESPONDENT'S OPPOSITION TO CERTIORARI

Pursuant to this Court's Rule 22.5, Petitioner Radiation Technology, Inc. ("Radiation") files this Reply to the Brief in Opposition filed by Respondent Neutron Products, Inc. ("Neutron"). This Reply will be limited to matter introduced by Respondent's Opposition.

I:

Neutron states (at page 6 of its Opposition) that:

> "The hearing on both these motions was held on May 30, 1984 before the District Court."

Neutron plainly implies that the May 30 hearing was understood by both parties and the Court to embrace both Respondent's Motion for Summary Judgment and Respondent's Rule 11 Motion for costs. That implication is wholly

false. An examination of Appendices, J, K and L (filed by Radiation with its Petition herein) indicates that Judge John Hargrove scheduled the May 30 hearing solely on Respondent's Motion for Summary Judgment (App. J, dated April 18, 1984). Thereafter Respondent, by letter to the Court dated May 9 sought to have both motion heard (App.K). But Petitioner opposed this joinder in a letter to the Court dated May 16, 1984. No further word from the Court was heard. When Counsel came to the courtroom in Baltimore on May 30, the only notice that the Court had given them was that the hearing on that day was on Respondent's motion for summary judgment and on that Motion alone. Petitioner simply was not on notice that Respondent's Rule 11 was to be heard on

May 30th.

II:

Neutron further states at page 6 of its Opposition, that:

> "Furthermore, at no time before the hearing did Radiation file a motion seeking to postpone it"

The letter of May 16, 1984 to the Court (Appendix L) ended:

> "But Plaintiff requests that the hearing on May 30 be restricted to the issue originally set by the Court for that date; to wit, the motion for summary judgment."

That motion was the only motion scheduled by the Court for that date.1/

1/ The six week time lag between notice and hearing of the Summary Judgment Motion (April 18 to May 30) clearly indicates that this separate hearing on the Rule 11 Motion (filed May 4) would be subsequent to the May 30th hearing.

Appendix L clearly requested a separate, subsequent hearing on Respondent's Rule 11 Motion.

III:

Neutron contradicts itself and the facts of what occurred on May 30, 1984 when it argues first:

> "Radiation filed a lengthy written memorandum in Opposition to Neutron's motion to recover its attorney's fees" (Respondent's Opposition at 12)

and then states in its final paragraph on page 16 that the:

> "Issue of due Process was not raised before the trial court." (Respondent's Opposition, 16)

What the Radiation brief (filed on May 21, 1984 and in the record before Judge Gray on May 30), did was to pinpoint the half dozen clear disputes of sworn 1/

1/ On Petitioner's Motion for Preliminary Injunction, disposed of 17 months before the hearing before Judge Gray on May 30, 1984.

fact that stood between the parties on the Rule 11 Motion. The magic words "due process" were not set forth in that brief because the events of May 30 were still nine days in the future. But any judge and any lawyer reading Petitioner's May 21 filing could not possibly read that submission without understanding with perfect clarity that a factual hearing was required to resolve the "half dozen clear issues of fact" outlined in the memorandum filed by Petitioner on May 21. Petitioner's memorandum was in the record before Judge Gray on May 30th.

Primary among those issues of fact was the question of whether Arkansas refused entry of Respondent's sources because under its licensing statute, it had determined that:

> "because of the existence of the micro-cracks, the State of Arkansas had" "determined that such cracks pose a radioactive threat unacceptable to it." (Respondent Opposition, at 10)

Either Arkansas did or did not take that position until april 2, 1982 1B/. The implication from Bevill's 1C/ affidavit is clearly that Dr. Welt volunteered reencapsulation without any requirement from Arkansas. To Judge Gray the factual dispute was clear; he held that Bevill told the truth and that Dr. Welt did not.

1B/ Dr. Welt's sworn testimony is that until April 2, 1982, Arkansas refused entry of Respondent's Cobalt, and his testimony further stated that on April 2 he undertook to reencapsulate the Cobalt within one year, relying on Respondent's promise to do so at no cost. Then, and only then, did Arkansas permit Respondent's Cobalt into the state (App. E-2)

1C/ Arkansas' health official.

Contrary to Respondent's statement (at page 13 of its opposition), Petitioner desired no "full trial" before Judge Gray issued his Rule 11 award. What it asked then and now was live testimony from the two witnesses whose sworn statements disputed each other.1D/ Live testimony obviously may not be required in all Rule 11 proceedings. But when sworn, conflicting written affidavits are the basis of the Rule 11 award (as in this case), there is no other way that a Court find the truth. In this case, due process dictated that Judge Gray hear and see Bevill and Dr. Welt before accepting Bevill's afffidavit, and branding Dr. Welt's as false.

1D/ On the major disputed issue of whether Arkansas refused entry of respondent's Cobalt without Petitioner's undertaking to reencapsulate; See footnote 1B, supra.

IV:

In dealing with whether the due process point was raised before the District Court, raised at page 16 of Respondent's Opposition, 1DD/ it is essential for the Court to understand the sequence of events that occurred on May 30th. This is best done by Reference to the transcript.

Early on in the hearing, Judge Gray stated:

> "Gentlemen, I wish I had time to study this entire record: (Appendix M, attached to this Reply)

At that point and until immediately prior to breaking of the hearing(to enable Judge Gray to read the record) Counsel for Plaintiff had no inkling whatever that what was going on in that courtroom went beyond the summary judgment motion scheduled for that day. Then at page 46 of an 85 page transcript, Judge Gray stated for the

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1DD/ Petition has already described its written memorandum of Opposition to the Rule 11 Motion, filed on May 21, 1984 which was on the record before Judge Gray on May 30, 1984, in which Petitioner delineated point by point the disputes of fact between the parties, supra, p 4-5.

first time: (see Appendix N, attached to this Reply):

> "The Court: Let me interrupt this. Gentlemen I am going to check the record. I am going to put this off. I am supposed to put this off until tomorrow morning but if I find that Defendants are right and that Arkansas did not refuse to accept this material, I am going to award attorney's fees" (Appendix N, page 46 of the Transcript of May 30, 1984)

That was the first surfacing of the unscheduled Rule 11 motion 1E/ more than half way through what had been an argument on summary judgment.

1E/ On the issue of Arkansas' refusal to admit Respondent's Cobalt, on which the sworn statements of Dr. Welt and Bernard Bevill (the Arkansas health official) were in dispute.

What follows on page 52 of the transcript reflects the prejudicially unfair situation into which Judge Gray's unexpected and unschedule foray plunged Petitioner. (The page is Appendix O to this Reply).

Counsel for Petitioner had consulted with Radiation's headquarters in Rockaway in a short break and found that Dr. Welt was out of the country. He was there because Petitioner had not been notified that the Rule 11 motion was to be heard in Baltimore on May 30. Nonetheless counsel stated:

> "Mr. Sharlitt:
> What we're asking for was a bit more time because I was unable to get a client of mine down here for this hearing. I asked and they could not come."

The total futility of any future hearing on the matter under the peculiar

circumstances of this case was then made clear by Judge Gray:

> "The Court:
>
> I am going home to Los Angeles tomorrow afternoon, and I have another matter on the calendar that I must take tomorrow morning; so I am going to make some time for this tomorrow morning."

In six pages of transcript, Judge Gray had (1) flatly determined that he was going to enter sanctions if he found that Arkansas had not refused Respondent's sources in--a fact bitterly opposed by the sworn testimony of Dr. Welt; (2) indicated that he was returning to Los Angeles the following day. The result of these pronouncements forced Petitioner's counsel to argue, as best he could, the split of fact between affiants on a paper record. The intervention of Rule 11 motion had come

as a total surprise; Judge Gray's determination to impose sanctions was fixed and unchangeable as any reading of the record makes clear; and there was no way that Petitioner could make Dr. Welt available in Baltimore within 24 hours--and no way to subpoena Neutron's affiants within those 24 hours.2/

In five pages at the close of the hearing (following the above) Judge Gray made his award. Again, the magic words "due process" were not mentioned, but Petitioner's counsel did make it clear (above at Tr. 52) to the Court that he wished testimony from Welt,

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2/ The impossible situation faced by Petitioner on May 30, 1984 would have been very different had the trial judge been Judge Hargrove or any other federal Judge in that District. Then, Petitioner could have asked for the additional time in order to present live testimony. But this was imposible in light of Judge Gray's manifest determination to enter sanctions and depart to the West Coast on the next day.

3/ which was impossible given Judge Gray's flat decision to award sanctions and his announced departure to the West Coast on the following day.4/

V: Conclusion

For the reason stated in Petitioner's Petition and in this Reply, the Writ of Certiorari should be issued by this Court.

Respectfully submitted,

Joseph H. Sharlitt
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

(202) 393-4940

Counsel to Petitioner
Radiation Technology, Inc.

Dated: February , 1986

3/ As any reading of Petitioner's May 21 memorandum (in the record before Judge Gray on May 30) would have been made unmistakably clear.

4/ Appendix O (attached to this reply) contains Judge Gray's statement in the transcript of May 30, 1984 that he was awarding costs under Rule 11 based on Petitioner's Motion for Preliminary Injunction 17 months earlier and not on any averments or conduct that were before him on May 30, 1984.

THE COURT: What did the defendant say in response to the plaintiff's prodding?

MR. SHARLITT: Simply that they were having problems and also an attempt to try and get a waiver based on delivery of all of this amount by February 28th, which waiver was turned down.

THE COURT: Which waiver was --

MR. SHARLITT: By Welt. Welt said we need this stuff on December 15th.

THE COURT: You don't agree with Mr. Nichelson's assessment of the colloquy.

MR. SHARLITT: No, I don't, sir. no, I don't.

THE COURT: Gentlemen, I wish I had time to study this entire record.

THE COURT: Let me interrupt this. Gentlemen, I am going to check the record. I am going to put this off. I am supposed to put this off until tomorrow morning but if I find that the Defendants are right and that Arkansas did not refuse to accept this material, I am going to award attorneys fees to the defendant on this.

I am going to read the record.

That's another thing.

Gentlemen, the next thing I am going to take up is the discovery. But in the present state of this matter, it is obvious to the Court that the defendant is entitled to summary judgment on the quantity issue. I am not a bit sure on the best efforts issue; I am troubled by that. The defendant is going to get summary judgment with respect to the

nonconforming sources, those six or seven that were deficient, by 12,000 curies.

matter of the Discovery issues now?

MR. NICHOLSON: If we are going to come back tomorrow I see no reason.

THE COURT: I have another matter on tomorrow morning.

MR. SHARLITT: Your Honor, if Your Honor wants us back, of course--

THE COURT: I don't want you back at all, I want you to settle th is case. It seems to me that I learned a bad settlement is better than a good lawsuit and I am not sure this is a very good lawsuit. I am not sure. I just don't know but I will check the record and find out.

MR. SHARLITT: What we're asking for was a bit more time because I was unable to get a client of mine down here for this hearing. I asked and they could not come.

THE COURT: I am going home to Los Angeles tomorrow afternoon, and I have another matter on the clanedar that I must take on tomorrow morning; so I am going to make some time for this tomorrow morning, if necessary.

MR. NICHOLSON: At the rate it is raining there may be a legitimate fear of high water.

THE COURT: Let's talk about the discovery.

MR. NICHOLSON" Mr. Harvey is going to deal with those.

THE COURT: What are the costs.

MR. HARVEY: Approximately $15,000, Your Honor.

THE COURT: All right. Well, attorneys fees will be awarded in the amount of $25,000 and $15,000 in costs. This is on the basis of Mr. Hamley as an attorney that is entitled to charge the value of his service $160,000, and Mr. Galen 110, which would amount to more than the $25,000, but there is, has to be a certain amount of duplication, and I will make a deduction for the fact that there are two people involved instead of one, just like you two fellows involved here today. You are doubling up today, and I will not make the plaintiffs pay for that. The

attorneys fees will be $25,000 and the costs will be $15,000.

MR. SHARLITT: Your Honor, may I inquire?

THE COURT: Yes.

MR. SHARLITT: This is based on the seeking of the--

THE COURT: Preliminary injunction.

MR. SHARLITT: On the warranty.

THE COURT: On all of the bases they went through.

MR. SHARLITT: Okay.

THE COURT: With respect to the preliminary injunction.

MR. SHARLITT: All right.

THE COURT: All right. Gentlemen, the defendants will preare an appropriate order, and I think you better prepare findings on that, too. I

will submit them to counsel and get counsel's approval as to form. I will file them with the clerk, and they will send them to me in Los Angeles. All right, gentlemen. That will be the order.

MR. NICHOLSON: Thank you, Your Honor.

(Hearing adjourned.)

* * * * *